

RULE MAKING ACTIVITIES

Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

AAM -the abbreviation to identify the adopting agency
01 -the *State Register* issue number
96 -the year
00001 -the Department of State number, assigned upon receipt of notice.
E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

Italics contained in text denote new material. Brackets indicate material to be deleted.

Department of Agriculture and Markets

NOTICE OF ADOPTION

Firewood (All Hardwood Species) and Other Host Tree Materials Susceptible to the Asian Long Horned Beetle

I.D. No. AAM-51-11-00004-A

Filing No. 137

Filing Date: 2012-02-14

Effective Date: 2012-02-29

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 139.2 of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18, 164 and 167

Subject: Firewood (all hardwood species) and other host tree materials susceptible to the Asian Long Horned Beetle.

Purpose: To lift the Asian Long Horned Beetle quarantine in the Town of Islip, since the pest has not been found there since 2002.

Text or summary was published in the December 21, 2011 issue of the Register, I.D. No. AAM-51-11-00004-P.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Kevin S. King, Director, Division of Plant Industry, NYS Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-2087

Assessment of Public Comment

The agency received no public comment.

Department of Civil Service

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Civil Service publishes a new notice of proposed rule making in the *NYS Register*.

Supplemental Military Leave Benefits

I.D. No.	Proposed	Expiration Date
CVS-06-11-00004-P	February 9, 2011	February 9, 2012

Education Department

EMERGENCY RULE MAKING

Occupational Therapy

I.D. No. EDU-09-12-00009-E

Filing No. 136

Filing Date: 2012-02-14

Effective Date: 2012-02-14

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of Part 76 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 6504 (not subdivided), 6507(2)(a), 7906(4), (7); and L. 2011, ch. 460

Finding of necessity for emergency rule: Preservation of public health and general welfare.

Specific reasons underlying the finding of necessity: The proposed amendments to the Regulations of the Commissioner of Education are necessary to conform them to the requirements of Chapter 460 of the Laws of 2011. Chapter 460 amended Article 156 of the Education Law to amend the scope of practice of occupational therapists, to provide for the supervision of limited permittees in occupational therapy, to provide for practice as exempt individuals by occupational therapy assistant students, to authorize and provide for the definition of practice of occupational therapy assistants, to provide that occupational therapist assistants shall be subject to the disciplinary and regulatory authority of the Board of Regents and the Department, and to make various technical changes to these sections of the Education Law. The proposed regulations implement the new law.

Emergency action is necessary for the preservation of the public health and general welfare to immediately conform the Commissioner's regulations to Chapter 460 of the Laws of 2011, and thereby ensure that such regulations are in effect on February 14, 2012, the effective date of such law, to implement the new practice and supervision provisions consistent with statutory requirements.

It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the May 2012 Regents meeting, after publication in the State Register and expiration of the 45-day public comment period on proposed rule makings required by the State Administrative Procedure Act.

Subject: Occupational Therapy.

Purpose: To implement Chapter 460 of the Laws of 2011, relating to the profession of occupational therapy.

Text of emergency rule: 1. Subdivision (b) of section 76.4 of the Regulations of the Commissioner of Education is amended, effective February 14, 2012, as follows:

(b) Limited permits may be renewed once for a period not to exceed one year at the discretion of the department because of personal or family illness or other extenuating circumstances which prevented the permittee from becoming licensed[, provided that the permittee has not failed the licensing examination in occupational therapy].

2. Section 76.5 of the Regulations of the Commissioner of Education is repealed, and 76.7 of the Regulations of the Commissioner of Education is renumbered 76.5, effective February 14, 2012.

3. Section 76.6 of the Regulations of the Commissioner of Education is renumbered 76.8, and new sections 76.6, 76.7, and 76.9 are added, effective February 14, 2012, to read as follows:

76.6 Definition of occupational therapy assistant practice and the use of the title occupational therapy assistant.

(a) An "occupational therapy assistant" shall mean a person authorized in accordance with this Part who provides occupational therapy services under the direction and supervision of an occupational therapist or licensed physician and performs client related activities assigned by the supervising occupational therapist or licensed physician. Only a person authorized under this Part shall participate in the practice of occupational therapy as an occupational therapy assistant, and only a person authorized under this Part shall use the title "occupational therapy assistant."

(b) As used in this section, client related activities shall mean:

(1) contributing to the evaluation of a client by gathering data, reporting observations and implementing assessments delegated by the supervising occupational therapist or licensed physician;

(2) consulting with the supervising occupational therapist or licensed physician in order to assist him or her in making determinations related to the treatment plan, modification of client programs or termination of a client's treatment;

(3) the utilization of a program of purposeful activities, a treatment program, and/or consultation with the client, family, caregiver, or other health care or education providers, in keeping with the treatment plan and under the direction of the supervising occupational therapist or licensed physician;

(4) the use of treatment modalities and techniques that are based on approaches taught in an occupational therapy assistant educational program registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department, and that the occupational therapy assistant has demonstrated to the occupational therapist or licensed physician that he or she is competent to use; or

(5) the immediate suspension of any treatment intervention that appears harmful to the client and immediate notification of the occupational therapist or licensed physician.

76.7 Requirements for authorization as an occupational therapy assistant.

To qualify for authorization as an occupational therapy assistant pursuant to section 7906(7) of the Education Law, an applicant shall fulfill the following requirements:

(a) file an application with the Department;

(b) have received an education as follows:

(1) completion of a two-year associate degree program for occupational therapy assistants registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department; or

(2) completion of a postsecondary program in occupational therapy satisfactory to the Department and of at least two years duration;

(c) have a minimum of three months clinical experience satisfactory to the state board for occupational therapy and in accordance with standards established by a national accreditation agency which is satisfactory to the Department;

(d) be at least eighteen years of age;

(e) be of good moral character as determined by the Department;

(f) register triennially with the Department in accordance with the provisions of subdivision (h) of this section, sections 6502 and 7906(8) of the Education Law, and sections 59.7 and 59.8 of this Subchapter;

(g) pay a fee for an initial license and a fee for each triennial registration period that shall be one half of the fee for initial license and for each triennial registration period established in Education law for occupational therapists; and

(h) except as otherwise provided by Education Law section 7907(2), pass an examination acceptable to the Department.

76.9 Occupational therapy assistant student exemption. To be permitted to practice as an exempt person pursuant to section 7906(4) of the Education Law, an occupational therapy assistant student shall be enrolled in a program as set forth in section 76.7(b)(1) of this Part and may work with an occupational therapy assistant who is acting as a fieldwork educator. Such student shall be directly supervised by an occupational therapist in accordance with standards established by a national accreditation agency which is satisfactory to the Department. Any such work performed by an occupational therapy assistant as a fieldwork educator shall be subject to the supervision requirements of section 76.8 of this Part.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire May 13, 2012.

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-8857, email: legal@mail.nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Section 207 of the Education Law grants general rule-making authority to the Board of Regents to carry into effect the laws and policies of the State relating to education.

Section 6504 of the Education Law provides that admission to the professions shall be supervised by the Board of Regents, and administered by the Education Department, assisted by a state board for each profession.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and practice of the professions.

Subdivision (4) of section 7906 of the Education Law authorizes the Commissioner of Education to define in regulation the direct supervision of an occupational therapy assistant student engaged in occupational therapy as an exempt person.

Subdivision (7) of section 7906 of the Education Law authorizes the Commissioner of Education to define occupational therapy assistants and to promulgate regulations governing standards for authorization to practice as an occupational therapy assistant, including those relating to education, experience, examination and character, and authorizes the Board of Regents to establish an application fee for such authorization to practice.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment to section 76.4(b) of the Regulations of the Commissioner of Education carries out the intent of the aforementioned statutes by removing the provision that prohibits a holder of a limited permit in occupational therapy from receiving a renewal of the permit in the event the holder has failed the licensing examination.

The proposed adoption of a new section 76.6 of the Commissioner's regulations carries out the intent of the aforementioned statutes by defining occupational therapy practice and providing that only a person authorized by the Department shall participate in the practice of occupational therapy assistant and use the title occupational therapy assistant.

The proposed adoption of a new section 76.7 of the Commissioner's regulations carries out the intent of the aforementioned statutes by establishing standards for authorization to practice as an occupational therapy assistant, including those relating to education, experience,

examination, and character, and by establishing fees for initial licensure and for triennial registration.

The proposed adoption of a new section 76.9 of the Commissioner's regulations carries out the intent of the aforementioned statutes by setting requirements for an occupational therapy student to qualify for the statutory exemption allowing him or her to practice under supervision.

3. NEEDS AND BENEFITS:

The changes to the existing law governing the practice of occupational therapy that were enacted by Chapter 460 of the Laws of 2011 authorized the Department to establish, in regulation, several significant components of the practice, including the requirements for eligibility and scope of practice for occupational therapy assistants, and requirements for supervision of occupational therapy assistant students. These regulations are necessary to implement the provisions of Chapter 460.

4. COSTS:

(a) Cost to State government: It is anticipated that the costs to the State Education Department in implementing the requirements of Chapter 460 of the Laws of 2011 will be offset by the licensure and registration fees authorized by the law.

(b) Cost to local government: None.

(c) Cost to private regulated parties: As authorized by Chapter 460 of the Laws of 2011, the proposed regulations also establish fees for licensure and triennial registration.

(d) Costs to the regulatory agency: As stated in "Costs to State Government," the proposed amendment does not impose costs on the State Education Department beyond those covered by the proposed licensure and registration fees for occupational therapy assistants.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed amendments do not require additional paperwork.

7. DUPLICATION:

The amendment does not duplicate other existing State or Federal requirements.

8. ALTERNATIVES:

Alternatives to the supervision requirements for occupational therapy assistant students were considered. Virtually all of such students in New York State attend programs accredited by the National Board for Certification in Occupational Therapy (NBCOT), and there is no other recognized national body for accreditation of such programs. NBCOT has established accreditation standards governing the fieldwork of occupational therapy assistant students, and it is believed that these are adequate to protect the public. The alternative would be to create new standards, but this may create a duplicative set of standards that may not be consistent with those used by a given educational program. It was also noted that the NBCOT accreditation standards permit supervision of students by either occupational therapists or occupational therapist assistants. The statute is clear, however, in requiring that students be directly supervised by an occupational therapist.

9. FEDERAL STANDARDS:

There are no Federal standards regarding the matters addressed by these regulations.

10. COMPLIANCE SCHEDULE:

The proposed amendment must be complied with on its stated effective date. No additional period of time is necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

The proposed amendments would implement various changes to existing law governing the practice of occupational therapy that were enacted by Chapter 460 of the Laws of 2011, including requirements for eligibility and scope of practice for occupational therapy assistants, and requirements for supervision of occupational therapy assistant students.

The amendments do not regulate small businesses or local governments. It does not impose any reporting, recordkeeping, or other compliance requirements on small business or local governments beyond those inherent in the statute, or have any adverse economic effect on them. Because it is evident from the nature of the proposed amendments that they do not affect small businesses or local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendments apply to all occupational therapy assistants and those occupational therapists and physicians who supervise these professionals who live in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The purpose of the proposed amendment is to implement chapter 460 of the Laws of 2011 which made a variety of changes to the law affecting the practice of occupational therapy and the authorization of occupational therapy assistants. As authorized by chapter 460, the proposed amendment will establish qualifications to be authorized to practice as an occupational therapy assistant, and will not require regulated parties, including those that are located in rural areas of the State, to hire professional services to comply.

3. COSTS:

The proposed section 76.7(g) of the Commissioner's regulations establishes a fee for an initial license and for each triennial registration for an occupational therapy assistant. The establishment of this fee is mandated by statute. The proposed regulation would set this fee at one half that amount imposed on occupational therapists, which would yield a fee of \$147 for initial licensure and three year registration, and a fee of \$90 for the subsequent three year re-registrations. Currently, these fees are set at \$103 for initial licensure and three year registration, and at \$54 for the subsequent three year registrations only. The increase is required because occupational therapists are now subject to discipline and moral character review by the Department, and the cost of these processes must be covered by fee revenue.

4. MINIMIZING ADVERSE IMPACT:

The proposed fee structure was determined to be the minimum needed to support additional costs. It is on a par with fee structures in other professions.

5. RURAL AREA PARTICIPATION:

The State Education Department solicited comments on the proposed amendments from the New York State Occupational Therapy Association (NYSOTA), and Department staff attended a meeting of the Capital District NYSOTA (which includes Schenectady, Rensselaer, Columbia and Greene counties) in Albany and the Hudson-Taconic NYSOTA (which includes Ulster, Sullivan, Dutchess and Delaware counties) in Middletown to discuss these proposed amendments.

Job Impact Statement

The proposed amendments would implement various changes to existing law governing the practice of occupational therapy that were enacted by chapter 460 of the Laws of 2011, including requirements for eligibility and scope of practice for occupational therapy assistants, and requirements for supervision of occupational therapy assistant students. Because it is evident from the nature of the amendment that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

State Board of Elections

NOTICE OF ADOPTION

Amend Information Recorded in Poll Books (Eliminate Voter Height/Eye Color); Reduction of Record Retention Regarding Poll Books

I.D. No. SBE-43-11-00001-A

Filing No. 106

Filing Date: 2012-02-08

Effective Date: 2012-02-29

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 6212.9(b) of Title 9 NYCRR.

Statutory authority: Election Law, sections 3-100, 8-312(6), 9-102(1) and 9-106

Subject: Amend information recorded in poll books (eliminate voter height/eye color); reduction of record retention regarding poll books.

Purpose: Amend existing regulation to comply with current federal statutory requirements.

Text or summary was published in the October 26, 2011 issue of the Register, I.D. No. SBE-43-11-00001-P.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Paul M. Collins, New York State Board of Elections, 40 Steuben Street, Albany, NY 12207, (518) 474-6367, email: Paul.Collins@elections.ny.gov

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Firewood Restrictions to Protect Forests from Invasive Species

I.D. No. ENV-09-12-00007-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Repeal of section 192.5; and addition of new sections 192.5 and 192.6 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101(3)(b), (d), 3-0301(1)(b), (d), (2)(m), 9-0105(1), (3) and 9-1303

Subject: Firewood Restrictions to Protect Forests from Invasive Species.

Purpose: To make revisions to the current regulation to clarify its intent.

Text of proposed rule: Section 192.5 is repealed and new sections 192.5 and 192.6 are adopted.

Section 192.5 Firewood Restrictions to Protect Trees and Forests from Invasive Species

(a) *Definitions. For the purposes of this section, these terms shall be defined as follows:*

(1) *“Department” shall mean the New York State Department of Environmental Conservation.*

(2) *“Firewood Dealer” shall mean any person, including a firewood producer, that sells firewood at retail.*

(3) *“Firewood” shall mean all wood of any species, cut or not cut, split or not split, regardless of length which is in a form and size appropriate for use as a fuel or which is destined for use as fuel. Kiln dried lumber is exempt from this section.*

(4) *“Firewood producer” shall mean any person who processes firewood for sale at the wholesale level or sells firewood at the wholesale level.*

(5) *“New York-Approved Treated Firewood/Pest-Free” shall mean a labeling standard for firewood that may be used by a firewood producer who complies with the provisions of subdivision (d) of this section.*

(6) *“Origin” shall mean the village, town, city, or street address where firewood for personal use was grown.*

(7) *“Person” shall mean an individual, organization, corporation, business, or partnership, public authority, county, town, village, city, municipal agency or public corporation, other than the department.*

(8) *“Personal Use” shall mean the use of firewood as a fuel, under the conditions specified in subdivision (e) of this section.*

(9) *“Phytosanitary certificate” or “plant health certificate” shall mean an official document issued by a State Department of Agriculture and Markets or the United States Department of Agriculture Animal Plant Health Inspection Service or equivalent certification from the country in which the treated firewood was produced which certifies that the firewood meets the phytosanitary regulations of New York State in accordance with the provisions of subdivision (a)(13) of this section.*

(10) *“Self-issued Certificate of Origin” shall mean a document for the possession of firewood for personal use as specified in subdivision (e) of this section which specifies the date, name of the possessor, the street address, city, state and zip code of the possessor, the origin of the firewood being possessed, the final destination of the firewood, and the approximate volume in cords or cubic feet being possessed. A sample self-issued certificate of origin shall be available on the department’s website and at the department’s regional offices.*

(11) *“Source” shall mean the village, town, or city designated by a firewood dealer or firewood producer as the location no greater than 50 miles from where said untreated firewood was grown. For untreated firewood produced from pallets, or which is a by-product of industrial, commercial, or wood milling operations, “source” shall mean the actual business or mill street address where such firewood is produced.*

(12) *“Source Documentation” shall mean a document which shall include the name and legal address of the firewood producer or firewood dealer, the source of the firewood, and the approximate volume of firewood if greater than one cord or 128 cubic feet. Source documentation may consist of a bill of lading, purchase receipt or invoice accompanying all such firewood sold or a label attached to each package or bundle of firewood.*

(13) *“Treated Firewood” shall mean firewood treated to achieve a minimum wood core temperature of 71°C for a minimum of 75 minutes. Such treatment may employ kiln-drying or other treatments approved by the department that achieve this specification through use of steam, hot water, dry heat or other methods.*

(14) *“Untreated Firewood” shall mean any firewood that has not been treated in accordance with the provisions of subdivision (a)(13) of this section.*

(15) *“50 Miles” shall mean a 50 mile linear distance determined by using the scale-bar on a New York State road map, atlas, or gazetteer.*

(b) Prohibitions.

(1) *No person shall, buy, sell, possess, or import, by any means, untreated firewood into this state from any location outside the state.*

(2) *No person shall buy, sell, or possess untreated firewood within the state without source documentation, as defined in subsection (a)(12), or a self-issued certificate of origin, as defined in subsection (a)(10).*

(3) *No person shall buy, sell, or possess untreated firewood produced from trees that are grown in New York State, more than 50 miles from the source of the firewood.*

(4) *No person shall sell at the retail level treated firewood unless it is labeled in accordance with subdivision (d) of this section.*

(5) *No person shall buy, sell, possess or import, by any means, treated firewood in this state unless the treated firewood is accompanied by a label as specified in subdivision (d) of this section or a phytosanitary certificate or a plant health certificate.*

(c) Untreated Firewood

(1) *Firewood dealers of untreated firewood, produced from trees that are grown in the state, shall provide source documentation to all purchasers.*

(2) *Firewood dealers of untreated firewood shall maintain records of their firewood purchases or procurement to verify the firewood was grown no more than 50 miles from the source. Records shall also include the name and address of the person(s) from whom the firewood was obtained and the date(s) of purchase or procurement. Such records shall be retained for two years and shall be made available for inspection by the department upon request.*

(3) *Firewood producers of untreated firewood shall provide to firewood dealers written source documentation for all untreated firewood supplied to them.*

(4) *Firewood producers of untreated firewood shall maintain records of log or wood purchases or procurement to verify firewood was grown no more than 50 miles from the source. Records shall also include*

the name and address of the person(s) from whom the logs or wood made into firewood were obtained and the date(s) of purchase or procurement. Such records shall be retained for two years and shall be made available for inspection by the department upon request.

(d) Treated Firewood

(1) Treated Firewood sold at the retail level in New York shall be labeled "New York-Approved Treated Firewood/Pest-Free" or shall include a phytosanitary certificate or plant health certificate. The above wording or certification shall be prominently displayed on the bill of sale or lading, purchase receipt or invoice for bulk shipments or sales or on a label affixed to any bundle or package. This labeling shall constitute the firewood dealer's certification that the firewood is treated firewood.

(2) Treated firewood sold at the wholesale level in the state shall be labeled "New York-Approved Treated Firewood/Pest-Free" or shall include a phytosanitary certificate or plant health certificate. The above wording or certification shall be prominently displayed on the bill of sale or lading, purchase receipt or invoice for bulk shipments or sales or on a label affixed to any bundle or package. This labeling shall constitute the firewood producer's certification that the firewood is treated firewood.

(3) Producers of "New York-Approved Treated Firewood/Pest-Free" firewood shall maintain, for at least two years from the date of treatment, records that document the treatment method and the volume of firewood treated, and shall also allow department officials to inspect such records and the facilities used to treat firewood upon request.

(e) Firewood for Personal Use

(1) Persons who possess untreated firewood not purchased from a firewood producer or a firewood dealer, for personal use, must complete and possess a self-issued certificate of origin.

(2) A self-issued certificate of origin shall be signed by the person possessing the untreated firewood for personal use.

(3) No person shall possess untreated firewood for personal use more than 50 miles from the origin of the firewood.

(4) Untreated firewood which originates from a person's own property, for personal use on that same property, is exempt from the requirements of this section.

(5) Persons possessing untreated firewood or treated firewood on property other than state land under the department's jurisdiction as described in subsection 190.0(a) or under the jurisdiction of the New York State Office of Parks, Recreation and Historic Preservation where it will be used for fuel are exempt from the requirement of possessing source documentation or a self-issued certificate of origin as specified in subsection (b)(2) and (e)(1), or a label, phytosanitary certificate or a plant health certificate as specified in subsection (b)(5).

(f) Enforcement

(1) In addition to any other enforcement provided by law or regulation, when treated or untreated firewood is found to be moving or to have been moved intrastate in violation of any provision set forth in this section and/or section 192.6, or is likely to result in irreversible or irreparable damage to natural resources, the law enforcement officer may take such action as he/she deems necessary pursuant to ECL section 71-0301 and/or 6 NYCRR Part 620, including, but not limited to, confiscation of the untreated firewood, at the expense of the violator and without cost to the state.

(2) If a person is held liable or found guilty in any prosecution, civil or criminal, of the buying, selling, transportation, or possession of treated or untreated firewood in violation of this section or section 192.6 or if a person shall effect a civil compromise of any action or cause of action in favor of the state arising out of such violation, the person's interest in any and all such firewood shall be forfeited to the state and such firewood shall be disposed of as the department shall direct at the defendant's expense.

Section 192.6 Quarantine Orders.

No person shall fail to comply with the provisions of any quarantine order issued by the department pursuant to ECL section 9-1303. To the extent any of the provisions of section 192.5 and any such quarantine order are in conflict, the more restrictive provision shall apply.

Text of proposed rule and any required statements and analyses may be obtained from: Bruce Williamson, Bureau of Private Land Services, NYS Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4253, (518) 402-9425, email: firewood@gw.dec.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Additional matter required by statute: A Negative Declaration has been prepared in compliance with Article 8 of the Environmental Conservation Law.

Regulatory Impact Statement

Statutory authority:

The Environmental Conservation Law (ECL) provides the Department

of Environmental Conservation ("Department") with broad and comprehensive authority to preserve forests within the State from disease and insects known to destroy tree species that grow in New York. For example, ECL section 1-0101(3)(b) directs the Department to guarantee "that the widest range of beneficial uses of the environment is attained without risk to health or safety, unnecessary degradation or other undesirable or unintentional consequences." ECL section 1-0101(3)(d) directs the Department to preserve the unique qualities of the Adirondack Forest Preserve. ECL section 3-0301(1)(b) gives the Department the responsibility to "promote and coordinate management of...land resources to assure their protection... and take into account the cumulative impact upon all such resources in... promulgating any impact upon all such resources... in promulgating any rule or regulation." ECL section 3-0301(1)(d) authorizes the Department to "exercise care, custody and control" of forest preserve lands; ECL section 9-0105(1) authorizes the Department to "exercise care, custody and control of the several preserves, parks and other state lands described" in ECL Article 9; ECL section 3-0301(2)(m) authorizes the Department to adopt rules and regulations "as may be necessary, convenient or desirable to effectuate the purposes of the ECL"; and ECL 9-0105 (3) authorizes DEC to "make necessary rules and regulations to secure proper enforcement of ECL Article 9." Furthermore, ECL Section 1-0101(3)(b) directs the Department to guarantee "that the widest range of beneficial uses of the environment is attained without risk to health or safety, unnecessary degradation or other undesirable or unintentional consequences."

In addition to the general authority summarized above, ECL section 9-1303 provides the Department with specific authority to control and prevent the spread of forest insects and forest tree diseases, including (i) conducting necessary investigations to discover better methods of control or prevention of the spread of forest insects and forest tree diseases, (ii) entering upon any lands for the purpose of determining if such property is infested with forest insects or forest tree diseases, (iii) establishing quarantine districts in the State, (iv) prohibiting the movement of materials which may be harboring forest insects or forest tree diseases in any of their different forms, (v) establishing zones to prevent the spread of forest insect and disease pests, and making modifications in the composition of the forest growth as deemed necessary, including spraying, cutting, destroying or treating vegetation, and (vi) adopting rules and regulations to prevent the spread of or to control forest insects and forest tree diseases.

Legislative objectives:

As detailed below, the Department proposes pursuant to this rulemaking to amend the existing firewood regulations for the purpose of making them easier to understand and implement; i.e., the substantive requirements would remain largely unchanged. Accordingly, the proposed amendments would continue the Department's pursuit of protecting New York's trees and forests, as directly authorized under the sections of the ECL summarized above. In particular, the amended regulations would continue the Department's regulatory authority over the importation and movement of wood products that have been demonstrated to be carriers of numerous invasive and/or exotic forest pests that are harmful to New York tree species. Indeed, the United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS), as well as applicable State agencies, have determined that the movement of infested firewood is associated with new and expanded disease and insect infestations, particularly with respect to the Emerald ash borer, which has infested areas of Michigan, Illinois, Indiana, and West Virginia. However, in the absence of a confirmed, specific pest infestation, APHIS lacks authority to prohibit the movement of wood materials which may potentially contain such species across state borders. The proposed regulations at issue, clearly authorized under the ECL, represent the Department's pro-active effort to prevent both the interstate and intrastate transport of firewood containing non-indigenous and dangerous insects.

Needs and benefits:

The Department is proposing to revise the current firewood regulation to clarify the requirements and conditions, and re-arrange the sections to make them easier to interpret, comply with and enforce for all affected parties. The proposed revisions to section 192.5 do not change any of the existing substantive requirements, prohibitions or conditions concerning the import, sale, possession or movement of firewood in New York State. These revisions are being proposed directly in response to feedback, comments and questions received from the public, law enforcement officers and judges in the two years since the initial regulations were adopted. Regular workshops and training sessions have been conducted for campers, firewood producers and dealers, residential firewood users, municipalities and campground operators to inform them about invasive forest pests, the risks associated with firewood movement and the details of the Department's firewood regulation. A "firewood hotline" has also been maintained at the Department's Central Office that has fielded thousands of calls from people and businesses with questions about the firewood regulation, and the related State and Federal Emerald ash borer and Asian

longhorned beetle quarantines in New York (both invasive forest and both quarantines also include "firewood" in their list of "regulated articles").

There are several provisions of section 192.5 that are being clarified. For example, the definition of "firewood" was clarified to mean all wood destined for use as a fuel and kiln dried lumber was expressly excluded; and, provisions related to untreated firewood and treated firewood are now addressed in separate subsections.

The Department is also proposing to adopt a new section 192.6 at the request of Department Law Enforcement personnel, to clarify that failure to obey quarantine orders constitutes a violation of the ECL. Apparently, some local judges were unable to determine whether the existing regulations addressed this issue.

The needs for and benefits associated with regulating firewood imports and movement in New York were previously discussed in the initial firewood regulation, proposed and adopted in 2009. The identical needs and benefits still exist today: protection of New York's tree species. Again, the proposed regulations are needed to simply clarify the requirements for the benefit of firewood producers, dealers and consumers, as well as for Law Enforcement officials and local judges. The changes to the regulation's language and organization, proposed by Department Law Enforcement and Legal staff, will benefit all parties by making it easier for them to understand and comply with the regulation. The changes proposed will also facilitate enforcement of the regulation by Department officers and other law enforcement agencies. In summary, the purpose behind the proposed and initial regulations is the same: to reduce the risk of introduction and spread of invasive insects and diseases of trees by preventing untreated firewood from entering New York State and restricting the movement, within the State, of firewood that originates in New York State. The proposed regulations are intended to simply make the firewood requirements easier to understand and implement.

As noted above, the Department determined that there was a need to clarify the regulatory requirements based on its extensive and aggressive public information, outreach and education campaign regarding invasive forest pests and firewood movement. Indeed, this effort follows on the heel of efforts taken prior to adoption of the initial regulations. Since 2008, for example, the Department initiated a strong "Don't Move firewood" message to both raise awareness of the risks and to inform the public about the (new) firewood regulations and its requirements. These efforts will continue within the constraints of funding and staffing. Additionally, prior to adoption of the firewood regulation in 2009, the Department held a dozen public meetings around the State, covering every Department region, to inform interested affected stakeholders of the need for firewood regulations. These meetings included information about how producers, dealers and consumers of firewood will be affected, along with the actions necessary for their compliance. Further, the development of regulations was based, in part, on firewood surveys at Department Campgrounds. The purpose of the surveys was to determine trends in firewood movement, as well as the availability and cost of firewood at and around campgrounds.

Costs:

The proposed amendment to the existing firewood regulation does not impose any additional costs on either the regulated community or the Department.

Local government mandates:

The proposed amendment to the existing firewood regulation does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district or other special district.

Paperwork:

The proposed amendment of the existing firewood regulation does not impose any new paperwork requirements on either the regulated community or the Department.

Duplication:

The proposed amendment of the existing firewood regulation does not duplicate any existing State or Federal regulation.

Alternatives:

The Department could leave the existing firewood regulation in place, as is, without amendment. However, this alternative would not resolve the clarity and enforcement issues associated with the existing regulation. As noted, Department Law Enforcement and Legal staff have indicated that the current regulation, as written, poses difficulties with respect to enforcement, as some sections are either not sufficiently clear, or redundant. Because of the need for clarity, the Department rejected the alternative of leaving the existing regulation in place.

Federal standards:

APHIS's authority to impose quarantine restrictions concerning treatment and movement of firewood (a commodity) are only imposed in direct conjunction with a specific pest species regulatory action. Department staff is trying to be proactive and recognize that a wide variety of invasive, exotic forest pests and diseases may be transported to new areas on many different species of wood used as firewood.

The heat treating standard the Department is applying for imported

firewood is consistent with USDA APHIS Emerald ash borer quarantine standards and international trade standards for firewood and solid wood packaging materials.

Compliance schedule:

Regulated parties are already aware of and operating under the existing firewood regulation. The changes proposed will essentially have no impact on the requirements or restrictions that currently exist for firewood producers, dealers, or consumers. The only substantive change for firewood consumers would be that consumers would no longer be required to retain source or origin documentation for firewood they possess, on private property, where it will be used. This actually relaxes the regulatory burden on firewood users and reduces potential problems for Law Enforcement officials. Source or origin documentation would still be required to be possessed by users when on lands under the jurisdiction of the Department or Office of Parks, Recreation and Historic Preservation.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with this proposal because the proposal will not impose any reporting, record-keeping or other compliance requirements on small businesses or local governments. The Department is proposing to revise the current firewood regulation to clarify the requirements and conditions, and re-arrange the sections to make interpretation, compliance and enforcement easier for all affected parties. The proposed revisions to the existing rule do not change any of the existing substantive requirements, prohibitions or conditions concerning the import, sale, possession or movement of firewood in New York State, rather they will clarify requirements and facilitate field enforcement for officers. This will allow for more efficient enforcement of the regulation.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this proposal because the proposal will not impose any reporting, record-keeping or other compliance requirements on rural areas. The Department is proposing to revise the current firewood regulation to clarify the requirements and conditions, and re-arrange the sections to make interpretation, compliance and enforcement easier for all affected parties. The proposed revisions to the existing rule do not change any of the existing substantive requirements, prohibitions or conditions concerning the import, sale, possession or movement of firewood in New York State, rather they will clarify requirements and facilitate field enforcement for officers. This will allow for more efficient enforcement of the regulation.

Job Impact Statement

A Job Impact Statement is not submitted with this proposal because the proposal will have no substantial adverse impact on existing or future jobs and employment opportunities. The Department is proposing to revise the current firewood regulation to clarify the requirements and conditions, and re-arrange the sections to make interpretation, compliance and enforcement easier for all affected parties. The proposed revisions to the existing rule do not change any of the existing substantive requirements, prohibitions or conditions concerning the import, sale, possession or movement of firewood in New York State, rather they will clarify requirements and facilitate field enforcement for officers. This will allow for more efficient enforcement of the regulation.

Department of Financial Services

EMERGENCY RULE MAKING

Special Risk Insurance

I.D. No. DFS-52-11-00018-E

Filing No. 128

Filing Date: 2012-02-10

Effective Date: 2012-02-10

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of Part 16 (Regulation 86) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202, 301 and 302; and Insurance Law, sections 301, 307, 308 and art. 63

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: This regulation was previously promulgated on an emergency basis on November 15, 2011. A Notice of Proposed Rulemaking was published in the State Register on December 28, 2011. The public comment period will end on February 11, 2012. On February 11, 2012 the Department will be able to take final action on the proposal. The emergency regulation will expire on February 10, 2012. Insurance Regulation 86 needs to remain effective for the general welfare. Chapter 490 of the Laws of 2011, which was signed by the Governor on August 17, 2011 to become effective 90 days after it became law, November 15, 2011, amended Article 63 of the Insurance Law which governs Special Risk Insurance by exempting insurers from certain rate and policy form approval requirements with respect to policies issued to "large commercial insureds". Section 6304 requires the superintendent to promulgate rules and regulations implementing the provisions of this article by establishing methods, procedures and reports for licensing and for facilitating, monitoring and verifying compliance with this article.

Since insurers are authorized to follow the new requirements as of the effective date of Chapter 490, November 15, 2011, it is essential that this regulation be promulgated on an emergency basis in order to have procedures in place that implement the provisions of the law.

For the reasons cited above, this regulation is being promulgated on an emergency basis for the preservation of the general welfare.

Subject: Special Risk Insurance.

Purpose: To revise the regulation to comply with chapter 490 of the Laws of 2011.

Text of emergency rule: Section 16.0 is amended to read as follows:

Section 16.0 Introduction.

This Part implements article 63 of the Insurance Law and establishes methods, procedures and reports for licensing, facilitating, monitoring and verifying compliance with the requirements of the Insurance Law. In effect, article 63 allows special risks that are jumbo in dimensions or exotic in nature to be written, free of filing rates or policy forms with the superintendent, in what is sometimes called the "Free Trade Zone". In addition, article 63 allows certain coverage for "large commercial insureds" to be written as special risks. Although filing is not required except as specified in section 6303, rates and policy forms applied to special risks must still satisfy governing standards set forth in the Insurance Law and regulations.

Section 16.1 is amended to read as follows:

Section 16.1 Definitions.

For purposes of this Part:

(a) Accident and health insurer has the meaning set forth in section 107(a)(1) of the Insurance Law.

(b) Authorized insurer has the meaning set forth in section 107(a)(10) of the Insurance Law.

(c) Large commercial insured has the meaning set forth in section 6303(b)(1) of the Insurance Law.

(d) Life insurer has the meaning set forth in section 107(a)(28) of the Insurance Law.

(e) Major type of insurance as used in this Part means the annual statement line of business based on the coverage part with the highest estimated premium at the time of issuance of the certificate of insurance.

(f) Medical malpractice insurance has the meaning set forth in section 5501(b) of the Insurance Law.

[(d)] (g) Net premiums written means gross premiums (direct and assumed premiums, including policy and membership fees, less return premiums and premiums for policies not taken) less reinsurance ceded.

[(e)] (h) Property/casualty insurer means an insurer licensed pursuant to article 41 or 61 of the Insurance Law.

[(f)] (i) Special risk manager has the meaning set forth in section 6303(b)(2) of the Insurance Law.

(j) Special risk means:

(1) Class 1. Where all or part of the insured's business operations, for which coverage is authorized by the kinds of insurance defined in section 1113(a) of the Insurance Law, is insured in a single policy written in accordance with section 6303 of the Insurance Law, and which is written with or is reasonably expected to produce a billed annual premium of at least:

(i) \$100,000 for at least one kind of insurance; or

(ii) \$200,000 for more than one kind where the premium for any one kind of insurance does not exceed \$100,000.

(2) Class 2. Coverages that are:

(i) of an unusual nature, a high loss hazard or difficult to place; and

(ii) enumerated in the list contained in section 16.12(e) of this Part, or additions thereto made pursuant to section 16.8(f) of this Part.

(3) Class 3. Coverage other than medical malpractice issued to a large commercial insured that employs or retains a special risk manager to assist in the negotiation and purchase of a policy exempted under this article, provided, however, that:

(i) the special risk manager is not employed by the insurer issuing the policy or any person in the insurer's holding company system; and
(ii) the special risk manager is licensed as an insurance producer in this state pursuant to Insurance Law article twenty-one, unless exempted from licensing therein.

Section 16.3 is amended to read as follows:

Section 16.3. Disclosure to insureds.

(a) The following notice shall appear conspicuously on the front page of each binder, policy, contract, rider or endorsement, and on all subsequent additions thereto, issued or renewed under Class 1 or 2 pursuant to section 6303(a)(1) or (2) of the Insurance Law:

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE [DEPARTMENT] LAW AND REGULATIONS. HOWEVER, [SUCH] THE FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

(b) The following notice shall appear conspicuously on the front page of each binder, policy, contract, rider or endorsement, and on all subsequent additions thereto, issued or renewed under Class 3 pursuant to section 6303(a)(3) of the Insurance Law:

NOTICE: THESE POLICY FORMS ARE NOT SUBJECT TO THE APPROVAL REQUIREMENTS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE LAW AND REGULATIONS. HOWEVER, THE FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

(c) [The] Each "Notice" required by subdivision (a) or (b) of this section shall be in bold capital letters, not less than three-eighths of an inch in height, enclosed in a border.

Section 16.4 is amended to read as follows:

Section 16.4 Policy forms, certificate of insurance and other standards.

(a) Every binder, policy, contract, rider and endorsement issued pursuant to section 6301 of the Insurance Law on special risks located or resident in New York State shall comply with minimum standard policy provisions of the Insurance Law and this Title.

(b) For a coverage coded as a class 3 risk pursuant to Section 16.12 of this Part, the insurer shall electronically file with the superintendent, in a form and manner acceptable to the superintendent:

(1) Within one business day of binding the insurance coverage, a certificate of insurance evidencing the existence and terms of the policy;

(2) Within 30 days from the inception date of the policy:

(i) the certificate of insurance specified in Section 16.4(b)(1) of this part; and

(ii) the following information:

(a) The identity of the insured and a statement that the insured meets the minimum commercial risk premium and financial condition standards for a "large commercial insured" pursuant to Section 6303(b) of the Insurance Law;

(b) Major type of insurance;

(c) Rate services organization classification (such as Insurance Service Organization classification), if applicable, or, if not applicable, a description of the class to be written;

(d) Risk manager name, employer and contact information, including mailing address, phone number and email address, and a statement that the insurer has verified that the risk manager who assisted in the negotiation and purchase of the policy on behalf of the insured meets the qualifications required by section 6303(b)(2) of the Insurance Law; and

(e) The New York producer license number, if the risk manager is required to be a New York licensed producer; and

(3) with respect to a policy form that has not been previously filed with the superintendent, the policy form, within three business days after first delivery of a policy using the form, but no later than 60 calendar days after the inception date of the policy.

(c)(1) An insurer required to make a filing or a submission to the superintendent electronically pursuant to this Part may apply to the superintendent for an exemption from the electronic filing requirement by submitting a written request to the superintendent for approval at least 30 days in advance of making the filing or submission.

(2) The request for an exemption shall:

(i) Identify the time period for which the insurer is requesting the exemption, and

(ii) Specify whether the insurer is making the request for an exemption based upon undue hardship, impracticability, or good cause, and set forth a detailed explanation as to the reason that the superintendent should approve the request.

Section 16.6(a) is amended to read as follows:

(a) An authorized insurer may apply for a special risk license to transact business written pursuant to section 6302 of the Insurance Law by completing an application form, prescribed by the superintendent and

available from the Property [Companies] Bureau of the [Insurance] Department of *Financial Services*.

Section 16.8 is amended to read as follows:

Section 16.8 Operational requirements.

(a) Class 1 [or], class 2 or class 3 coverages may be provided only to:

- (1) a single entity; or
- (2) two or more related entities, in each of which the same person, group of persons, or corporation holds a controlling interest.

(b) Class 1, [or] class 2 or class 3 coverages may not be provided in a manner that would constitute a group policy within the meaning of Part 153 of this Title.

(c) [Covered policies as defined in section 3425(a)(1) and (2) of the Insurance Law shall not be written as class 1 or class 2 risks.

(d) The kinds of business defined in the following numbered paragraphs of section 1113(a) of the Insurance Law shall not be written as class 1 risks:

- (1) life insurance;
- (2) annuities;
- (3) accident and health insurance;
- (15) workers' compensation and employers' liability;
- (18) title insurance;
- (23) mortgage guaranty insurance;
- (24) credit unemployment insurance; or
- (25) financial guaranty insurance.]

(1) Except as provided in subparagraph (2) of this subdivision, a policy may be written pursuant to Insurance Law article 63 and this Part if the policy provides only one or more of the kinds of insurance specified in Insurance Law section 1113(a)(4) through (14), (16), (17), (19) through (22), (27) and (29).

(2) A covered policy, as defined in section 3425(a)(2) of the Insurance Law or a policy providing coverage pursuant to Insurance Law section 1113(a)(1), (2), or (3) may be written as a class 2 risk if the coverage is included in the list of eligible class 2 risks contained in section 16.12(e) of this Part.

(3) A medical malpractice insurance policy may not be written as a class 3 risk.

(d) Notwithstanding any other provision of this Part, a policy may not be written pursuant to Insurance Law article 63 and this Part with respect to:

(1) Insurance specified in Insurance Law section 2328;

(2) Insurance specified in Insurance Law section 2305(b) except medical malpractice insurance may be written as a class 1 or 2 risk; or

(3) Insurance required to satisfy any financial responsibility requirement of this State.

(e) Where a policy includes coverage for both New York and non-New York exposures, the total premium for all exposures may be used for purposes of determining class 1 or class 3 eligibility pursuant to section 16.1(j) of this Part. *However, a report filed with the superintendent showing special risk premiums and losses shall only include risks related to New York exposures unless the statement filing instructions specify otherwise.*

(f)(1) Application may be made to the superintendent for adding a class to the list of eligible class 2 risks enumerated in section 16.12(e) of this Part.

(2) In reviewing such an application, the superintendent shall consider the following factors:

(i) whether the insurance coverage provided protects from perils or risks that are neither contained in, nor conducive to the use of, generic policy forms or filed rate schedules;

(ii) whether the type of insurance risk contains a substantial degree of peril or hazard that makes use of generic policy forms or filed rate schedules impractical; and

(iii) the extent to which the type of coverage is unavailable from authorized insurance markets.

(3) Class 2 additions shall be published in the State Register.

(4) Applications to the superintendent to add classes to the class 2 risk list shall include:

(i) a detailed description of the class for which filing exemptions are requested;

(ii) a statement indicating the reasons why the class should be considered unusual, having a high loss hazard, or difficult to place; and

(iii) a statement explaining why the filing requirements of the Insurance Law with regard to rates and forms would impose an undue impediment to the effective writing of the particular class of business in this State.

(g) Coverages qualifying as class 2 risks may be provided by separate individual policies or incorporated by endorsement into other policies. When coverages for class 2 risks are provided by endorsement, only the policy forms and rates applicable to such endorsement qualify for filing exemptions pursuant to this Part.

(h) No policy may be issued or renewed pursuant to class 3 on or after the date specified in Insurance Law section 6303(a)(3).

Section 16.12 (a) is amended to read as follows:

Section 16.12. Coding of class 1, [and] class 2, and class 3 risks.

(a) The principal operations of class 1 and class 3 risks shall be coded in accordance with the classification codes filed by the Insurance Services Office under the commercial statistical plan.

Subdivision (d) of Section 16.12 is amended to read as follows:

(d)(1) Special risks classified under class 2 [which generates] *that generate a premium in [the] an amount that qualifies as a class 1 risk shall, for reporting purposes, be designated as class 2 risks; and*

(2) Special risks classified under class 2 that also qualify as class 3 risks shall, for reporting purposes, be designated as class 2 risks.

Section 16.13 is repealed.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. DFS-52-11-00018-P, Issue of December 28, 2011. The emergency rule will expire April 9, 2012.

Text of rule and any required statements and analyses may be obtained from: David Neustadt, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1690, email: david.neustadt@dfs.ny.org

Regulatory Impact Statement

1. Statutory authority: Financial Services Law (FSL) Sections 202, 301 and 302, Insurance Law (NYIL) Sections 301, 307 and 308, and NYIL Article 63.

These sections establish the superintendent's authority to promulgate regulations establishing standards for governing Special Risk Insurance by exempting insurers from certain rate and policy form approval requirements.

FSL section 202 establishes the office of the Superintendent. FSL section 301 establishes the powers of the Superintendent generally. FSL 302 and Section 301 of the Insurance Law, in material part, authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and to prescribe regulations interpreting the Insurance Law.

NYIL Section 307 requires every authorized insurer and fraternal benefit society in New York to file an annual statement (audited financial statement) showing its condition at the last year end. The section further establishes specific requirement for the statements and penalties for failure to file timely.

Section 308 permits the Superintendent to request information from insurers in relation to transactions or conditions or any matter connected therewith.

Article 63 has long permitted special risks that are jumbo in dimensions or exotic in nature to be written, free of filing rates or policy forms, in what is sometimes called the "Free Trade Zone". As amended, Section 6303(a) now permits policies to be written with respect to "large commercial insureds," as such term is defined in that section. Section 6304 requires the Superintendent to promulgate rules and regulations implementing the provisions of this article by establishing methods, procedures and reports for licensing and for facilitating, monitoring and verifying compliance with this article.

2. Legislative objectives: Article 63 of the Insurance Law establishes standards for governing Special Risk Insurance. Section 6303 exempts insurers from certain rate and policy form approval requirements. Chapter 490 of the Laws of 2011 amended Article 63 of the Insurance Law to add a new exempted category of risks (Class 3 risks). The Class 3 risks are "large commercial insureds" that meet the qualifications specified in Article 63, including that a large commercial insured employ or retain a special risk manager to assist in the negotiation and purchase of the policy. Section 6304 requires the superintendent to promulgate rules and regulations implementing the provisions of Article 63 by establishing methods, procedures and reports for licensing and for facilitating, monitoring and verifying compliance with Article 63.

3. Needs and benefits: Chapter 490 of the Laws of 2011 amended Article 63 of the Insurance Law by introducing Class 3 risks to be written in New York by insurers licensed to write special risk insurance for "large commercial insureds," as defined in the amendment, provided that the insurers make certain informational filings with the Superintendent. The addition of the Class 3 risks was intended to enhance the ability of insurers to underwrite large and unusual risks in the New York market, increase speed to market for certain insurance products not currently exempted and facilitate more streamlined economic development in New York, as existing and emerging businesses that need to insure large or unusual risks would have quick access to the insurance they need. The rule sets forth the requirements for writing Class 3 risks and the procedures for insurers to make the required filings as stated in Chapter 490.

4. Costs: This rule imposes no compliance costs on state or local governments. While there may be some additional costs incurred by the Department resulting from the new filings, this should be minimized by

having the filings made electronically. This rule does not impose additional costs upon insurers since the additional special risk exemption is optional, not mandatory, on the part of the insurer. If an insurer chooses to issue a Class 3 policy, then the submission of a certificate of insurance and a policy form (if not previously filed) is required by the statute, and the rule is only implementing the statutory requirement. Although the filing of the certification is not mandated by the statute, it is necessary for the proper monitoring by the Department of new Class 3 business. However, since the Department has an electronic means for insurers to use for the submission of these filings, these additional costs will be nominal.

5. Local government mandates: This amendment does not impose any program, service, duty or responsibility upon a city, town or village, or school or fire district.

6. Paperwork: With respect to the new Class 3 filings, the rule requires an insurer to submit the certificate of insurance for each risk and to complete a certification form in a manner acceptable to the Superintendent. The Department intends to develop a standard certification form for insurers to use and plans to post the form on the Department's web site along with instructions for completing the form. Insurers are also required to file any policy form that has not been previously filed with the Superintendent, for informational purposes. Submissions of the certificate of insurance and of any policy form not previously filed with the Superintendent are statutory requirements of the new law. The completion and submission of the form to accompany the certificate of insurance is to facilitate compliance with the requirements with respect to Class 3 risks.

7. Duplication: This rule will not duplicate any existing state or federal rule.

8. Alternatives: The rule requires the submission of a certificate of insurance along with a form that includes additional information such as the identity of the insured and the risk manager utilized by the "large commercial insured" (the above-referenced certification form). The Department performed outreach with various insurer trade associations; the associations stated that it would be difficult for them to comply with the requirement to file electronically the certificate of insurance and the certification form within one business day from binding the policy. After further consideration of these comments, the Department revised the regulation to allow insurers to submit the certificate of insurance through a dedicated e-mail box within one day from binding the policy in order to comply with the statute. In addition, in order to provide more time for insurers to file the certification form the rule has been revised to require insurers to electronically file the certificate of insurance again along with the certification form within 30 days from the inception date of the policy. The alternative of not requiring the certification form to be submitted with the certificate of insurance was considered and rejected because the form will expedite the review of the filings, enhance compliance with the statute and rule and enable the Department to more easily monitor the types of Class 3 risks that insurers are writing.

The Department also received comments asking that the new notice required by the regulation to be placed on policies should be combined with the existing notice. However, upon consideration, the Department felt that combining the two notices would be confusing because of the differing requirements between Class 1 and 2 with new Class 3.

The rule requires Class 3 risk filings to be submitted electronically, unless the insurer is granted a hardship exemption, in which case a paper filing will be accepted. The alternative of accepting paper submissions from all insurers was considered and rejected as electronic submission of Class 3 risk filings will facilitate the monitoring and the generation of reports for Class 3 risks.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The effective date of the enabling legislation, Chapter 490 of the Laws of 2011, is November 15, 2011. Pursuant to the law, insurers may start writing the Class 3 risks as of the effective date and are required to file the certificate of insurance with the Department within one business day of binding the insurance coverage. Insurers are also required to file a policy form, which has not been previously filed with the Superintendent, for informational purposes, but both of these filings are required by the statute.

Regulatory Flexibility Analysis

1. Small businesses:

The Department of Financial Services finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at property/casualty insurance companies licensed to do business in New York State, none of which falls within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act. The Department of Financial Services has monitored Annual Statements and Reports on Examination of authorized property/casualty insurers subject to this rule, and believes that none of the insurers falls within the defini-

tion of "small business", because there are none that are both independently owned and have fewer than one hundred employees.

2. Local governments:

The rule does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments. The basis for this finding is that this rule is directed at property/casualty insurance companies, none of which are local governments.

Rural Area Flexibility Analysis

The Department of Financial Services finds that this rule does not impose any additional burden on persons located in rural areas, and it will not have an adverse impact on rural areas. This rule applies uniformly to regulated parties that do business in both rural and non-rural areas of New York State.

Job Impact Statement

The Department of Financial Services finds that this rule should have no adverse impact on jobs or economic opportunities in New York State. It merely revises the filing requirements and governing standards of special risk insurance to add a new exempted category of risks (Class 3 risks) for certain "large commercial insureds" in order to comply with Chapter 490 of the Laws of 2011. The number of insurance company personnel necessary to submit Class 3 filings should be no different than submitting these risks under the prior law.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Minimum Standards for the New York State Partnership for Long-Term Care Program

I.D. No. DFS-09-12-00008-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Amendment of Part 39 (Regulation 144) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202, 301 and 302; Insurance Law, sections 301, 1117, 3201, 3217, 3221, 3229, 4235, 4237 and art. 43; and Social Services Law, section 367-f

Subject: Minimum Standards for the New York State Partnership for Long-Term Care Program.

Purpose: To amend minimum standards for inflation protection, to add a new plan and add disclosure requirements relating to reciprocity.

Substance of proposed rule (Full text is posted at the following State website: www.dfs.ny.gov): In an effort to encourage more New Yorkers to plan for their future long term care needs, New York State established the New York State Partnership for Long-Term Care program ("Partnership") by enacting Section 367-f of the Social Services Law and Section 3229 of the Insurance Law in 1989. The Partnership originally provided that New York State residents who purchased a qualified long term care insurance policy or certificate would, once the benefits from the policy or certificate were exhausted, become eligible for Medicaid assistance without spending down any of their assets ("Total Asset Protection"). The original insurance available under Regulation 144 provided minimum coverage of three years for nursing home benefits, or six years for home care benefits at half the nursing home benefit rate (the "3/6/50 Plan"). In addition, Total Asset Protection under Medicaid would be available upon exhaustion of the 3/6/50 Plan's insurance benefits.

In 2005, the Insurance Department (now the Department of Financial Services) promulgated the Second Amendment to Regulation 144. That amendment permitted three additional insurance products to be sold under the Partnership. Two of the new plan designs (the "1.5/3/50 Plan" and the "2/2/100 Plan") provided shorter benefit periods and more affordable coverage, but Medicaid asset protection would only be provided to the extent of insurance benefits paid under the policy ("Dollar-for-Dollar Asset Protection"). The third plan provided a minimum of four years of nursing home, residential care facility services or home care coverage with benefits paid at the full nursing home rate (the "4/4/100 Plan"). However, Total Asset Protection under Medicaid would be available upon exhaustion of the 4/4/100 Plan's insurance benefits.

The Third Amendment makes three changes to Regulation 144. First, this amendment adds a new three and one half percent lifetime annual compound inflation protection benefit option to all the plan designs. Second, it adds a new Total Asset Protection plan design (the "2/4/50 Plan"). Third, the amendment adds consumer disclosure requirements relating to reciprocity, whereby a New York Partnership insured with a

Partnership qualified policy/certificate may receive Medicaid Dollar-for-Dollar Asset Protection from a reciprocal state while New York Partnership insureds replacing coverage with an out-of-state Partnership insurance policy/certificate from a reciprocal state may receive Medicaid Dollar-for-Dollar Asset Protection from New York State.

Paragraphs 39.3(b)(8), 39.4(b)(8), 39.5(b)(11), and 39.6(b)(11) of Regulation 144 are amended to require that Partnership qualified policies/certificates issued to insureds under age 80 must provide either a three and one half percent or five percent lifetime annual compound inflation protection benefit, at the choice of the insured.

Section 39.7 adds a new section creating the 2/4/50 Plan design with requirements identical to current plan designs except that a shorter duration Medicaid Total Asset Protection plan is available. The 2/4/50 Plan design provides two years of nursing home care coverage or four years of home and community-based care and/or residential care facility services (Section 39.7(b)(1), (2), (3), (4)). Benefits for home and community-based care or residential care facility services are paid at half the nursing home care coverage daily benefit (Section 39.7(b)(1), (2), (3), (4)). The minimum daily benefits for nursing home care coverage are the same as are currently established under Regulation 144 for the other Partnership plan designs for calendar years 2012 through 2013 (Section 39.7(b)(1)). The 2/4/50 Plan design also provides for the following required benefits: 20 days annually of nursing home care bed reservation (Section 39.7(b)(5)), 20 days annually of residential care facility bed reservation (Section 39.7(b)(6)), 14 days annually of respite care (Section 39.7(b)(7)), inpatient and outpatient hospice care (Section 39.7(b)(8)), alternate care (Section 39.7(b)(9)), and care management (Section 39.7(b)(10)). Either a three and one half percent or five percent lifetime annual compound inflation protection benefit (applicable percentage chosen by insured) is required in any Partnership qualified policy/certificate issued under age 80 (Section 39.7(b)(11)). Premiums must be level (Section 39.7(b)(12)). Where one qualified policy/certificate is replaced by another qualified policy/certificate, time credit must be given in the new replacement coverage for time elapsed under the original Partnership policy/certificate concerning certain pre-existing condition/waiting periods (Section 39.7(b)(13)). If a national long term care program is ever enacted, the qualified policy/certificate must state how the Partnership coverage will be modified (Section 39.7(b)(14)). Elimination periods of no greater than 100 days are permitted (Section 39.7(b)(15)). Qualified policies/certificates providing the 2/4/50 Plan design must meet all federal and New York statutory and regulatory standards for favorable tax qualification status, and expense incurred coverage must be offered while other reimbursement models may be offered (Section 39.7(b)(16) and 39.7(c)).

Section 39.8 is a new section that explains: (1) what happens when an insured replaces a New York Partnership policy with a Partnership policy of another state; (2) what happens to the insured's Medicaid asset protection if an insured leaves New York State, or another state's Partnership insured moves into New York State, (3) what happens if a state is not a reciprocal state or not a Partnership state, and (4) whether an insured is eligible for the New York State long term care insurance income tax credit if the insured replaces a New York Partnership policy or certificate.

For in-force qualified policies/certificates delivered until the effective date of the amendment, the disclosure statement shall be provided but acknowledgment of receipt or certification of delivery is not required (Section 39.8(b)).

Text of proposed rule and any required statements and analyses may be obtained from: David Neustadt, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1690, email: david.neustadt@dfs.ny.gov

Data, views or arguments may be submitted to: Colleen Rumsey, NYS Department of Financial Services, One Commerce Plaza, Albany, NY 12257, (518) 486-7815, email: colleen.rumsey@dfs.ny.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the promulgation of the third amendment to Regulation 144 derives from Sections 202, 301, and 302 of the Financial Services Law; Sections 301, 1117, 3201, 3217, 3221, 3229, 4235, 4237, and Article 43 of the Insurance Law; and Section 367-f of the Social Services Law.

Section 202 of the Financial Services Law establishes the office of the Superintendent.

Section 301 of the Financial Services Law establishes the powers of the Superintendent generally.

Section 302 of the Financial Services Law and Section 301 of the Insurance Law, in material part, authorize the Superintendent to effectuate any power accorded to the Superintendent by the Financial Services Law, Insurance Law, or any other law, and prescribe regulations interpreting the Insurance Law.

Section 1117 of the Insurance Law authorizes the Superintendent to permit the sale of contracts in connection with a plan for long term care pursuant to the criteria set forth therein.

Section 3201 of the Insurance Law prohibits an accident and health insurance policy form to be delivered or issued for delivery in this state unless it has been filed with and approved by the Superintendent as conforming to the requirements of the Insurance Law and not inconsistent with the law.

Section 3217 authorizes the Superintendent to issue regulations to establish minimum standards, including standards for full and fair disclosure, for the form, content and sale of accident and health insurance policies and subscriber contracts of corporations organized under Article 32 and Article 43 of the Insurance Law, and Article 44 of the Public Health Law.

Section 3221 of the Insurance Law prohibits a policy of group or blanket accident and health insurance, except as provided in Insurance Law § 3221(d), to be delivered or issued for delivery in New York unless it contains in substance the provisions set forth therein or provisions which are in the opinion of the Superintendent more favorable to the holders of such certificates or not less favorable to the holders of such certificates and more favorable to policyholders.

Section 3229 of the Insurance Law authorizes the Superintendent to issue regulations, in consultation with the Commissioner of Health and the Director of the State Office for the Aging, as approved by the Director of Budget, establishing minimum standards which may qualify under the Partnership for Long Term Care program pursuant to Social Services Law § 367-f.

Section 4235 of the Insurance Law prohibits a policy of group accident, group health or group accident and health insurance to be delivered or issued for delivery in this state unless it conforms to the descriptions set forth in that section.

Section 4237 of the Insurance Law defines a blanket accident policy, a blanket health policy, and a blanket accident and health policy.

Article 43 of the Insurance Law sets forth requirements for non-profit medical and dental indemnity, or health and hospital services corporations.

Section 367-f of the Social Services Law establishes the Partnership for Long Term Care Program.

2. Legislative objectives: The Partnership for Long Term Care Program (the "Partnership") was established to encourage New Yorkers to implement solutions for their future long term care needs by combining private long term care insurance with Medicaid Extended Coverage. Social Services Law Section 367-f originally required an individual to be covered under a Partnership insurance policy or certificate that provides a residential health care facility benefit of no less than three years in order for the individual to be eligible for Medicaid Extended Coverage. Section 82 of Part H of Chapter 59 of the Laws of 2011 amended Section 367-f of the Social Services Law to grant to an individual, who exhausts benefits under a Partnership insurance policy or certificate that provides a residential health care facility benefit of not less than two years, eligibility for medical assistance without spending down any assets ("Total Asset Protection"), thereby reducing the cost for New Yorkers to purchase Partnership policies.

3. Needs and benefits: In an effort to encourage New Yorkers to plan for their future long term care needs, New York established the Partnership through Chapter 454 of the Laws of 1989 by adding Social Services Law § 367-f and Insurance Law § 3229. The Partnership originally provided that New York State residents who purchased a qualified long term care insurance policy or certificate would become eligible for Total Asset Protection once the benefits from the policy or certificate were exhausted. Accordingly, the New York State Insurance Department, now the New York State Department of Financial Services (the "Department"), promulgated Regulation 144 providing minimum insurance coverage of three years for nursing home benefits, or six years for home care benefits at half the nursing home daily benefit rate (the 3/6/50 Plan). In addition, Total Asset Protection under Medicaid upon exhaustion of the 3/6/50 Plan insurance benefits was available.

Part B of Chapter 58 of the Laws of 2004 amended Section 367-f of the Social Services Law and Section 3229 of the Insurance Law to permit Medicaid asset protection in an amount equal to the amount of insurance benefits paid under the Partnership policy ("Dollar-for-Dollar Asset Protection"). Accordingly, in 2005, the Department amended Regulation 144 to permit three additional products to be sold under the Partnership. Two of the new plan designs (the 1.5/3/50 Plan and the 2/2/100 Plan) provide shorter benefit periods that are more limited than the 3/6/50 Plan, but that are more affordable. In addition, upon exhaustion of the 1.5/3/50 Plan or the 2/2/100 Plan, the insured is eligible for Dollar-for-Dollar Asset Protection. The third plan (the 4/4/100 Plan) provides minimum insurance coverage of four years of nursing home, residential care facility services or home care coverage with benefits paid at the full nursing home rate. The insured is eligible for Total Asset Protection upon exhaustion of the 4/4/100 Plan.

In Executive Order Number 5 (2011), the Governor established the Medicaid Redesign Team ("Team") to make recommendations to the Governor in order to update the Medicaid program with cost savings while improving program quality. The Team recognized that encouraging the purchase of long term care insurance enables consumers to fund their own long term care needs instead of relying on the Medicaid program, thus saving Medicaid expenditures. Based on Partnership program data showing that most Partnership insureds utilize less than two years of insurance benefits, the Team recommended adding a shorter Total Asset Protection insurance design option that provides a minimum of two years of nursing home coverage and four years of coverage for home care services (referred to as the 2/4/50 Plan). Accordingly, Section 82 of Part H of Chapter 59 of the Laws of 2011 reduces the minimum duration requirement from three years to two years for a Total Asset Protection insurance plan design.

To further Team goals of affordability and accessibility, the amendment to Regulation 144 adds a new inflation protection benefit option. Originally, Regulation 144 required Partnership policies and certificates issued to insureds under age 80 to provide a minimum of five percent compound lifetime annual inflation protection. However, the Department of Health found that Partnership insurers offered no greater inflation protection benefits than five percent. In addition, the Department of Health reviewed its data for the past ten years and found the nursing home cost inflation rate to be approximately three percent. Therefore, the amendment relies upon the Department of Health data and requires the insurer to offer both a three and one half percent compound lifetime annual inflation protection benefit and a five percent compound lifetime annual inflation protection benefit for all plan designs. The new lower cost inflation protection benefit makes Partnership long term care insurance more affordable, and encourages more New Yorkers to purchase Partnership long term care insurance which, in turn, saves Medicaid expenditures.

To also further Team goals, the Department of Health is submitting a state plan amendment to the federal Centers for Medicare and Medicaid Services to permit Partnership reciprocity with other states' Partnership programs in conformance with the notice issued by the Department of Health and Human Services ("HHS") (73 Fed. Reg. 51302 (September 2, 2008)). This change allows Partnership insureds to receive Dollar-for-Dollar Asset Protection in a reciprocal state. It also allows insureds from reciprocal states to receive Dollar-for-Dollar Asset Protection in New York State. Currently, thirty-seven Partnership states reciprocate Dollar-for-Dollar Asset Protection while two Partnership states do not.

In order to ensure that consumers purchasing Partnership policies fully understand the implications of reciprocity, the regulation requires insurers to provide applicants and insureds with appropriate disclosures about reciprocity. These disclosures must contain accurate explanations about Partnership insurance coverage and Medicaid asset protection. The written disclosure must explain: (1) what happens when an insured replaces a New York Partnership policy with a Partnership policy of another state; (2) what happens to the insured's Medicaid asset protection if an insured leaves New York State, or another state's Partnership insured moves into New York State, (3) what happens if a state is not a reciprocal state or not a Partnership state, and (4) whether an insured is eligible for the New York State long term care insurance income tax credit if the insured replaces a New York Partnership policy or certificate.

4. Costs: While insurers that choose to offer Partnership policies will incur some costs as a result of this amendment; this amendment does not impose any new requirements on insurers, since all insurers are required to file any rate and form changes with the Department, unless exempted by law. Insurers that offer Partnership policies will incur minimal costs to submit new rate and form filings reflecting the three and one half percent inflation protection benefit option. In addition, any Partnership insurers that choose to offer the 2/4/50 Plan also will incur minimal costs to submit new rate and form filings. Insurers that choose to participate in the Partnership will incur minimal costs because they will need to modify current disclosures or create new disclosures to comply with the regulation.

The Department will incur minimal costs to review the filings.

These rules impose no compliance costs on state or local governments or health care providers.

5. Local government mandates: These rules do not impose any program, service, duty or responsibility upon any city, town, village, school district or fire district.

6. Paperwork: The amendment imposes no new reporting requirements. Insurers that voluntarily participate in the Partnership will be required to submit rate and form filings to add the new inflation protection benefit option. In addition, Partnership insurers voluntarily offering the new 2/4/50 Plan design will be required to submit new rates and forms. Finally, insurers that voluntarily participate in the Partnership will be required to develop written reciprocity disclosures.

7. Duplication: These changes to the Partnership do not duplicate or conflict with any existing federal or state requirements.

8. Alternatives: These changes to the Partnership were presented to the

Partnership governance board on May 3, 2011. The board consists of Partnership insurer representatives and representatives from the Department and the New York State Department of Health and the New York State Office for the Aging, which acts as a consumer representative on the board. The board voted to accept the proposals on May 13, 2011. Two insurers expressed concerns over the new inflation protection benefit option and the 2/4/50 Plan. Those Partnership insurers emphasize marketing traditional non-Partnership long term care insurance, and do not want to change the Partnership products. Other Partnership insurers primarily emphasize marketing Partnership products, and want the changes of this amendment to give Partnership products better marketability and affordability. The regulation requires the insurers to offer the new inflation protection benefit option, while insurers have the option of offering the 2/4/50 Plan.

The Department sent an outreach draft to Partnership insurers, a trade group representing several insurers, the Department of Health and the State Office for the Aging on June 27, 2011, asking them to submit comments. The Department received responses to the request for comments from an insurer, a trade association and a state agency.

Changes were made to the proposal based on comments raised by interested parties. Comments indicated that some insurers wanted the flexibility to use disclosures that are substantially similar to those set forth in the regulation, and additional time to develop that disclosure language. Accordingly, the proposal was amended to allow insurers until June 1, 2012 to deliver the reciprocity disclosure. The proposal was also amended to allow insurers to develop their own disclosure language in compliance with the amendment. An interested party requested that the insurer have the choice of offering either the three and one half percent or five percent inflation protection benefit or both to applicants. Consistent with the affordability, accessibility and administrative goals of the Team and the Department of Health concerning Partnership long term care insurance, the amendment requires that the insurer offer both options to the applicant.

9. Federal standards: The notice issued by HHS provides standards for states to offer reciprocity. The standards allow insureds in any reciprocal state to obtain Dollar-for-Dollar Medicaid Asset Protection in another reciprocal state. The notice does not address insurance issues. The 2/4/50 plan design in this amendment requires that the policies/certificates are intended to meet the requirements for qualified long-term care insurance contracts pursuant to Section 7702B of the Internal Revenue Code. This requirement for favorable federal tax treatment is consistent with the requirement for the other three plans in Regulation 144, and recognizes that virtually all long term care insurance now sold is federally tax qualified.

10. Compliance schedule: The rule will take effect on June 1, 2012. Partnership insurers that choose to offer the new 2/4/50 plan must submit new rate and form filings in order to comply with the amendment. Partnership insurers must develop the disclosure language and submit new rate and form filings to comply with the three and one half percent compound lifetime annual inflation protection benefit.

Regulatory Flexibility Analysis

1. Effect of the rule: This amendment is directed at insurers that write New York State Partnership for Long Term Care program ("Partnership") insurance. None of those insurers fall within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act. The Department of Financial Services has reviewed filed Reports on Examination and Annual Statements of these entities, and believes that there are none that are both independently owned and that employ fewer than 100 persons. However, this amendment will affect those small employers, including sole proprietors, that offer group long term care insurance to their employees by providing them with an option to offer a less costly Partnership for Long Term Care plan that provides eligibility for Medicaid assistance without spending down any of their assets ("Total Asset Protection"). Employers will also be provided with a new inflation protection benefit option that is a less costly alternative to the existing option.

Insurance agents and brokers that sell Partnership policies, many of whom are small businesses themselves, may experience some impact as they will be required to familiarize themselves with the new inflation protection benefit option, new plan design and the disclosure surrounding reciprocity. Although agents and brokers will have to devote time to educating themselves on the changes in the Partnership program, these changes are designed to increase consumer interest by creating more flexible and affordable products that expand the base of prospective consumers. Thus, agents and brokers will benefit from increased sales of more affordable Partnership products. These regulations do not apply to or affect local governments.

2. Compliance requirements: These regulations will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments.

3. Professional services: Small businesses or local governments will not need professional services to comply with the regulations.

4. Compliance costs: These regulations will not impose any compliance costs upon small businesses or local governments, but may reduce insurance costs for small businesses that contribute towards their employees' group long term care insurance coverage by offering less costly alternatives as noted above.

5. Economic and technological feasibility: Small businesses or local governments will not incur an economic or technological impact as a result of the regulations.

6. Minimizing adverse impact: These regulations apply to the Partnership long term care insurance market throughout New York State. The same requirements will apply uniformly, and do not impose any adverse or disparate impact on small businesses or local governments.

7. Small business and local government participation: These regulations are directed at insurers licensed to do business in New York State, none of which fall within the definition of small business as found in Section 102(8) of the State Administrative Procedure Act. Notice of the proposal was previously published in the Department's June 2011 and January 2012 Regulatory Agendas. This notice was intended to provide small businesses with the opportunity to participate in the rule making process, but no input was received. Interested parties were also consulted through direct meetings during the development of the amendment. The changes contained in this amendment were first brought to the Partnership governance board for discussion at a meeting held on May 3, 2011. The Partnership governance board is comprised of representatives from Partnership insurers and representatives from the Department of Financial Services, the Department of Health and the State Office of the Aging, the consumer representative on the board. The board voted to accept the proposals on May 13, 2011. In addition, the Department sent an outreach draft to Partnership insurers and interested parties on June 27, 2011, asking insurers and interested parties to submit written comments. Through this comment process, insurers had an opportunity to participate in the rulemaking process for this regulatory change. The proposal has been revised to address comments raised during outreach.

Rural Area Flexibility Analysis

The Department of Financial Services finds that this rule does not impose any additional burden on persons located in rural areas and that it will not have an adverse impact on rural areas. This rule applies uniformly to regulated parties that do business in both rural and non-rural areas of New York State.

Job Impact Statement

The amendment will not adversely impact job or employment opportunities in New York. The amendment adds a new plan design to the New York State Partnership for Long Term Care program ("Partnership"), a less costly inflation protection benefit option to the existing plan designs, and a consumer disclosure regarding the use of Medicaid asset protection in other states, known as reciprocity. The adoption of this amendment may have a positive effect on jobs or employment opportunities if more insurers choose to offer this program and more insureds opt to purchase the lower cost plan design.

ment for residential health care facilities. It is necessary to issue this regulation on an emergency basis in order to maintain Medicaid beneficiaries' access to services by providing financial relief to eligible providers.

Subject: Temporary Rate Adjustment (TRA) - Residential Health Care Facilities (RHCF) (Nursing Homes).

Purpose: To provide a TRA to eligible RHCs subject to or impacted by closure, merger, acquisition, consolidation, or restructuring.

Text of emergency rule: Subpart 86-2 of title 10 of NYCRR is amended by adding a new section 86-2.39, to read as follows:

86-2.39 Closures, mergers, acquisitions, consolidations and restructurings. (a) The commissioner may grant approval of a temporary adjustment to the non-capital components of rates calculated pursuant to this subpart for eligible residential health care facilities.

(b) Eligible facilities shall include:

(i) facilities undergoing closure;

(ii) facilities impacted by the closure of other health care facilities;

(iii) facilities subject to mergers, acquisitions, consolidations or restructuring; or

(iv) facilities impacted by the merger, acquisition, consolidation or restructuring of other health care facilities.

(c) Facilities seeking rate adjustments under this section shall demonstrate through submission of a written proposal to the commissioner that the additional resources provided by a temporary rate adjustment will achieve one or more of the following:

(i) protect or enhance access to care;

(ii) protect or enhance quality of care;

(iii) improve the cost effectiveness of the delivery of health care services; or

(iv) otherwise protect or enhance the health care delivery system, as determined by the commissioner.

(d)(i) Such written proposal shall be submitted to the commissioner at least sixty days prior to the requested effective date of the temporary rate adjustment and shall include a proposed budget to achieve the goals of the proposal. Any temporary rate adjustment issued pursuant to this section shall be in effect for a specified period of time as determined by the commissioner, of up to three years. At the end of the specified timeframe, the facility shall be reimbursed in accordance with the otherwise applicable rate-setting methodology as set forth in applicable statutes and this Subpart. The commissioner may establish, as a condition of receiving such a temporary rate adjustment, benchmarks and goals to be achieved in conformity with the facility's written proposal as approved by the commissioner and may also require that the facility submit such periodic reports concerning the achievement of such benchmarks and goals as the commissioner deems necessary. Failure to achieve satisfactory progress, as determined by the commissioner, in accomplishing such benchmarks and goals shall be a basis for ending the facility's temporary rate adjustment prior to the end of the specified timeframe.

(ii) The commissioner may require that applications submitted pursuant to this section be submitted in response to and in accordance with a Request For Applications or a Request For Proposals issued by the commissioner.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire May 12, 2012.

Text of rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The statutory authority for this regulation is contained in Section 2808(2-c)(d) of the Public Health Law (PHL) as enacted by Section 95 of Part H of Chapter 59 of the Laws of 2011, which authorizes the Commissioner to promulgate regulations, including emergency regulations, with regard to Medicaid reimbursement rates for residential health care facilities. Such rate regulations are set forth in Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulation of the State of New York.

Legislative Objectives:

Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York, will be amended by adding a new section 2.39 to provide this temporary adjustment to eligible residential health care facilities subject to or impacted by the closure, merger, acquisition, consolidation, or restructuring of a health care provider in their service delivery area. In addition, the proposed regulation sets forth the conditions under which a provider will be considered eligible, the requirements for requesting a temporary rate adjustment, and the conditions that must be met in order to receive a temporary rate

Department of Health

EMERGENCY RULE MAKING

Temporary Rate Adjustment (TRA) - Residential Health Care Facilities (RHCF) (Nursing Homes)

I.D. No. HLT-09-12-00004-E

Filing No. 131

Filing Date: 2012-02-13

Effective Date: 2012-02-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of section 86-2.39 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 2808(2-c)(d)

Finding of necessity for emergency rule: Preservation of public health.

Specific reasons underlying the finding of necessity: Public Health Law Section 2808(2-c)(d), as enacted by Section 95 of Part H of Chapter 59 of the Laws of 2011, specifically provides the Commissioner of Health with authority to issue emergency regulations in order to compute rates of pay-

adjustment. The temporary rate adjustment shall be in effect for a specified period of time, as approved by the Commissioner, of up to three years. This regulation is necessary in order to maintain beneficiaries' access to services by providing needed relief to providers who meet the criteria.

Proposed section 86-2.39(c) requires providers seeking a temporary rate adjustment to submit a written proposal demonstrating that the additional resources provided by a temporary rate adjustment will achieve one or more of the following: (i) protect or enhance access to care; (ii) protect or enhance quality of care; (iii) improve the cost effectiveness of the delivery of health care services; or (iv) otherwise protect or enhance the health care delivery system, as determined by the Commissioner. The proposed amendment permits the Commissioner to establish benchmarks and goals, in conformity with a provider's written proposal as approved by the Commissioner, and to require the provider to submit periodic reports concerning the provider's progress toward achievement of such. Failure to achieve satisfactory progress in accomplishing such benchmarks and goals, as determined by the Commissioner, shall be a basis for ending the provider's temporary rate adjustment prior to the end of the specified timeframe.

Needs and Benefits:

In the center of a changing health care delivery system, the closure of a health care provider within a community often happens without adequate planning of resources for the remaining health care providers in the service delivery area. In addition, maintaining access to needed services while also maintaining or improving quality becomes challenging for the remaining providers. The additional reimbursement provided by this adjustment will support the remaining providers in achieving these goals, thus improving quality while reducing health care costs.

Costs:

Costs to Private Regulated Parties:

There will be no additional costs to private regulated parties. The only additional data requested from providers would be periodic reports demonstrating progress against benchmarks and goals.

Costs to State Government:

There is no additional aggregate increase in Medicaid expenditures anticipated as a result of these regulations, as the cost of the temporary rate adjustment will be offset by the overall reduction in Medicaid expenditures due to the closure, merger, acquisition, consolidation, or restructuring.

Costs to Local Government:

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of this proposed regulation.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of this proposed regulation.

Local Government Mandates:

The proposed regulation does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

An eligible provider must submit a written proposal, including a proposed budget. If a temporary rate adjustment is approved for a provider, the provider must submit periodic reports, as determined by the Commissioner, concerning the achievement of benchmarks and goals that are established by the Commissioner and are in conformity with the provider's approved written proposal.

Duplication:

This is an amendment to an existing State regulation and does not duplicate any existing federal, state or local regulations.

Alternatives:

No significant alternatives are available. Any potential projects that would otherwise qualify for funding pursuant to the revised regulation would, in the absence of this amendment, either not proceed or would require the use of existing provider resources.

Federal Standards:

The proposed regulation does not exceed any minimum standards of the federal government for the same or similar subject area.

Compliance Schedule:

The proposed regulation provides the Commissioner of Health the authority to grant approval of temporary adjustments to rates calculated for residential health care facilities that are subject to or affected by the closure, merger, acquisition, consolidation, or restructuring of a health care facility, for a specified period of time, as determined by the Commissioner, of up to three years.

Regulatory Flexibility Analysis

Effect of Rule:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be residential health care facilities with 100 or fewer full-time equivalents. Based on recent financial and statistical data

extracted from Residential Health Care Facility Cost Reports, approximately 40 residential health care facilities were identified as employing fewer than 100 employees.

No health care providers subject to this regulation will see a Medicaid rate decrease as a result of this regulation.

This rule will have no direct effect on local governments.

Compliance Requirements:

Providers that are granted a temporary rate adjustment must submit periodic reports, as determined by the Commissioner, concerning the achievement of benchmarks and goals that are established by the Commissioner and are in conformity with the provider's approved written proposal.

The rule will have no direct effect on local governments.

Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule because there are no technological requirements other than the use of existing technology, and the overall economic aspect of complying with the requirements is expected to be minimal.

Minimizing Adverse Impact:

This regulation seeks to provide needed relief to eligible providers, thus a positive impact for small businesses that are eligible and no impact for the remainder. In addition, local districts' share of Medicaid costs is statutorily capped; therefore, there will be no adverse impact to local governments as a result of this proposal.

Small Business and Local Government Participation:

The State filed a Federal Public Notice, published in the State Register, prior to the effective date of the change. The Notice provided a summary of the action to be taken and instructions as to where the public, including small businesses and local governments, could locate copies of the corresponding proposed State Plan Amendment. The Notice further invited the public to review and comment on the related proposed State Plan Amendment. In addition, contact information for the Department of Health was provided for anyone interested in further information.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with populations less than 200,000 and, for counties with populations greater than 200,000, include towns with population densities of 150 persons or less per square mile. The following 43 counties have populations of less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene		

The following nine counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

For residential health care facilities that receive the temporary rate adjustment, periodic reports must be submitted concerning the achievement of benchmarks and goals as approved by the Commissioner.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

This regulation provides needed relief to eligible providers, thus a positive impact for small businesses that are eligible and no impact for the remainder. In addition, local districts' share of Medicaid costs is statutorily capped; therefore, there will be no adverse impact to local governments as a result of this proposal.

Rural Area Participation:

A concept paper was shared with the hospital and long-term care industry associations, both of which include members from rural areas. Comments were received and taken into consideration while drafting the regulations. In addition, a Federal Public Notice, published in the New York State Register invited comments and questions from the general public.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulation provides a temporary rate adjustment to eligible residential health care facilities that are subject to or impacted by the closure, merger, acquisition, consolidation, or restructuring of a health care provider in its service delivery area. In addition, the proposed regulation sets forth the conditions under which a provider will be considered eligible, the requirements for requesting a temporary rate adjustment, and the conditions that must be met in order to receive a temporary rate adjustment. The proposed regulation has no implications for job opportunities.

EMERGENCY RULE MAKING

Hospital Temporary Rate Adjustments

I.D. No. HLT-09-12-00005-E

Filing No. 132

Filing Date: 2012-02-13

Effective Date: 2012-02-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 86-1.31 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-c(35)

Finding of necessity for emergency rule: Preservation of public health.

Specific reasons underlying the finding of necessity: Paragraph (b) of subdivision 35 of section 2807-c of the Public Health Law (as added by Section 2 of Part C of Chapter 58 of the Laws of 2009) specifically provides the Commissioner of Health with authority, effective for periods on and after December 1, 2009, to issue emergency regulations in order to compute hospital inpatient rates as authorized in accordance with the provisions of such subdivision 35.

Subject: Hospital Temporary Rate Adjustments.

Purpose: No longer require that a merger, acquisition or consolidation needs to occur on or after the year the rate is based upon.

Text of emergency rule: Subdivision (b) of section 86-1.31 of title 10 of NYCRR is hereby REPEALED and a new subdivision (b) is added, to read as follows:

(b) *Closures, mergers, acquisitions, consolidations and restructurings.*

(1) *The commissioner may grant approval of a temporary adjustment to the non-capital components of rates calculated pursuant to this subpart for eligible general hospitals.*

(2) *Eligible facilities shall include:*

(i) *facilities undergoing closure;*

(ii) *facilities impacted by the closure of other health care providers;*

(iii) *facilities subject to mergers, acquisitions, consolidations or restructuring; or*

(iv) *facilities impacted by the merger, acquisition, consolidation or restructuring of other health care providers.*

(3) *Facilities seeking rate adjustments under this section shall demonstrate through submission of a written proposal to the commissioner that the additional resources provided by a temporary rate adjustment will achieve one or more of the following:*

(i) *protect or enhance access to care;*

(ii) *protect or enhance quality of care;*

(iii) *improve the cost effectiveness of the delivery of health care services; or*

(iv) *otherwise protect or enhance the health care delivery system, as determined by the commissioner.*

(4)(i) *Such written proposal shall be submitted to the commissioner at least sixty days prior to the requested effective date of the temporary rate adjustment and shall include a proposed budget to achieve the goals of the proposal. Any temporary rate adjustment issued pursuant to this section shall be in effect for a specified period of time as determined by the commissioner, of up to three years. At the end of the specified timeframe, the facility shall be reimbursed in accordance with the otherwise applicable rate-setting methodology as set forth in applicable statutes and this Subpart. The commissioner may establish, as a condition of receiving such a temporary rate adjustment, benchmarks and goals to be achieved in conformity with the facility's written proposal as approved by the commissioner and may also require that the facility submit such periodic reports concerning the achievement of such benchmarks and goals as the commissioner deems necessary. Failure to achieve satisfactory progress, as determined by the commissioner, in accomplishing such benchmarks and goals shall be a basis for ending the facility's temporary rate adjustment prior to the end of the specified timeframe.*

(ii) *The commissioner may require that applications submitted pursuant to this section be submitted in response to and in accordance with a Request For Applications or a Request For Proposals issued by the commissioner.*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire May 12, 2012.

Text of rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The statutory authority for this regulation is contained in Section 2807-c(35)(b) of the Public Health Law (PHL) which authorizes the Commissioner to promulgate regulations, including emergency regulations, with regard to Medicaid reimbursement rates for general hospital inpatient services. Such rate regulations are set forth in Subpart 86-1 of Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulation of the State of New York.

Legislative Objectives:

Subpart 86-1 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York, paragraph (1) of subdivision (b) of section 1.31 will be amended to expand this temporary adjustment to eligible general hospitals that are subject to or impacted by the closure, merger, acquisition, consolidation, or restructuring of a health care provider in their service delivery area. In addition, the proposed regulation sets forth the conditions under which a provider will be considered eligible, the requirements for requesting a temporary rate adjustment, and the conditions that must be met in order to receive a temporary rate adjustment. The temporary rate adjustment shall be in effect for a specified period of time, as approved by the Commissioner, of up to three years. This regulation is necessary in order to maintain beneficiaries' access to services by providing needed relief to providers who meet the criteria.

Proposed section 86-1.31(b) requires providers seeking a temporary rate adjustment to submit a written proposal demonstrating that the additional resources provided by a temporary rate adjustment will achieve one or more of the following: (i) protect or enhance access to care; (ii) protect or enhance quality of care; (iii) improve the cost effectiveness of the delivery of health care services; or (iv) otherwise protect or enhance the health care delivery system, as determined by the Commissioner. The proposed amendment permits the Commissioner to establish benchmarks and goals, in conformity with a provider's written proposal as approved by the Commissioner, and to require the provider to submit periodic reports concerning the provider's progress toward achievement of such. Failure to achieve satisfactory progress in accomplishing such benchmarks and goals, as determined by the Commissioner, shall be a basis for ending the provider's temporary rate adjustment prior to the end of the specified timeframe.

Needs and Benefits:

In the center of a changing health care delivery system, the closure of a health care provider within a community often happens without adequate planning of resources for the remaining health care providers in the service delivery area. In addition, maintaining access to needed services while

also maintaining or improving quality becomes challenging for the remaining providers. The additional reimbursement provided by this adjustment will support the remaining providers in achieving these goals, thus improving quality while reducing health care costs.

Costs:

Costs to Private Regulated Parties:

There will be no additional costs to private regulated parties. The only additional data requested from providers would be periodic reports demonstrating progress against benchmarks and goals.

Costs to State Government:

There is no additional aggregate increase in Medicaid expenditures anticipated as a result of these regulations, as the cost of the temporary rate adjustment will be offset by the overall reduction in Medicaid expenditures due to the closure, merger, acquisition, consolidation, or restructuring.

Costs to Local Government:

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of this proposed regulation.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of this proposed regulation.

Local Government Mandates:

The proposed regulation does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

An eligible provider must submit a written proposal, including a proposed budget. If a temporary rate adjustment is approved for a provider, the provider must submit periodic reports, as determined by the Commissioner, concerning the achievement of benchmarks and goals that are established by the Commissioner and are in conformity with the provider's approved written proposal.

Duplication:

This is an amendment to an existing State regulation and does not duplicate any existing federal, state or local regulations.

Alternatives:

No significant alternatives are available. Any potential projects that would otherwise qualify for funding pursuant to the revised regulation would, in the absence of this amendment, either not proceed or would require the use of existing provider resources.

Federal Standards:

The proposed regulation does not exceed any minimum standards of the federal government for the same or similar subject area.

Compliance Schedule:

The proposed regulation provides the Commissioner of Health the authority to grant approval of temporary adjustments to rates calculated for general hospitals that are subject to or impacted by the closure, merger, acquisition, consolidation, or restructuring of a health care provider, for a specified period of time, as determined by the Commissioner, of up to three years.

Regulatory Flexibility Analysis

Effect of Rule:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full-time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

No health care providers subject to this regulation will see a decrease in average per-discharge Medicaid funding as a result of this regulation.

This rule will have no direct effect on local governments.

Compliance Requirements:

Providers that are granted a temporary rate adjustment must submit periodic reports, as determined by the Commissioner, concerning the achievement of benchmarks and goals that are established by the Commissioner and are in conformity with the provider's approved written proposal.

The rule will have no direct effect on local governments.

Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule because there are no technological requirements other than the use of existing technology, and the overall economic aspect of complying with the requirements is expected to be minimal.

Minimizing Adverse Impact:

This regulation seeks to provide needed relief to eligible providers, thus a positive impact for small businesses that are eligible and no impact for the remainder. In addition, local districts' share of Medicaid costs is statutorily capped; therefore, there will be no adverse impact to local governments as a result of this proposal.

Small Business and Local Government Participation:

The State filed a Federal Public Notice, published in the State Register, prior to the effective date of the change. The Notice provided a summary of the action to be taken and instructions as to where the public, including small businesses and local governments, could locate copies of the corresponding proposed State Plan Amendment. The Notice further invited the public to review and comment on the related proposed State Plan Amendment. In addition, contact information for the Department of Health was provided for anyone interested in further information.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with populations less than 200,000 and, for counties with populations greater than 200,000, include towns with population densities of 150 persons or less per square mile. The following 43 counties have populations of less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene		

The following nine counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

For hospitals that receive the temporary rate adjustment, periodic reports must be submitted concerning the achievement of benchmarks and goals as approved by the Commissioner.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

This regulation provides needed relief to eligible providers, thus a positive impact for small businesses that are eligible and no impact for the remainder. In addition, local districts' share of Medicaid costs is statutorily capped; therefore, there will be no adverse impact to local governments as a result of this proposal.

Rural Area Participation:

A concept paper was shared with the hospital industry associations, which include members from rural areas. Comments were received and taken into consideration while drafting the regulations. In addition, a Federal Public Notice, published in the New York State Register invited comments and questions from the general public.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulation expands the temporary rate adjustment to eligible hospitals that are subject

to or impacted by the closure, merger, acquisition, consolidation, or restructuring of a health care provider in its service delivery area. In addition, the proposed regulation sets forth the conditions under which a provider will be considered eligible, the requirements for requesting a temporary rate adjustment, and the conditions that must be met in order to receive a temporary rate adjustment. The proposed regulation has no implications for job opportunities.

EMERGENCY RULE MAKING

Temporary Rate Adjustment (TRA) - Licensed Ambulatory Care Facilities (LACF)

I.D. No. HLT-09-12-00006-E

Filing No. 133

Filing Date: 2012-02-13

Effective Date: 2012-02-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of section 86-8.15 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807(2-a)(e)

Finding of necessity for emergency rule: Preservation of public health.

Specific reasons underlying the finding of necessity: Paragraph (e) of subdivision 2-a of Section 2807 of the Public Health Law (as added by Section 2 of Part C of Chapter 58 of the Laws of 2009) specifically provides the Commissioner of Health with authority to issue emergency regulations in order to compute rates of payment for Article 28 licensed ambulatory care providers as authorized in accordance with the provisions of such subdivision 2-a.

Subject: Temporary Rate Adjustment (TRA) - Licensed Ambulatory Care Facilities (LACF).

Purpose: Expand TRA to include Article 28 LACFs subject to or affected by closure, merger, acquisition, consolidation, or restructuring.

Text of emergency rule: Subpart 86-8 of title 10 of NYCRR is amended by adding a new section 86-8.15, to read as follows:

86-8.15 Closures, mergers, acquisitions, consolidations, restructurings and inpatient bed de-certifications. (a) The commissioner may grant approval of a temporary adjustment to the non-capital components of rates calculated pursuant to this subpart for eligible ambulatory care facilities licensed under article 28 of the Public Health Law ("PHL").

(b) Eligible facilities shall include:

(i) facilities undergoing closure;

(ii) facilities impacted by the closure of other health care facilities;

(iii) facilities subject to mergers, acquisitions, consolidations or restructuring; or

(iv) facilities impacted by the merger, acquisition, consolidation or restructuring of other health care facilities.

(v) outpatient facilities of general hospitals which have entered into an agreement with the Department to permanently decertify a specified number of staffed hospital inpatient beds, as reported to the Department.

(c) Facilities seeking rate adjustments under this section shall demonstrate through submission of a written proposal to the commissioner that the additional resources provided by a temporary rate adjustment will achieve one or more of the following:

(i) protect or enhance access to care;

(ii) protect or enhance quality of care;

(iii) improve the cost effectiveness of the delivery of health care services; or

(iv) otherwise protect or enhance the health care delivery system, as determined by the commissioner.

(d)(i) Such written proposal shall be submitted to the commissioner at least sixty days prior to the requested effective date of the temporary rate adjustment and shall include a proposed budget to achieve the goals of the proposal. Any temporary rate adjustment issued pursuant to this section shall be in effect for a specified period of time as determined by the commissioner, of up to three years. At the end of the specified timeframe, the facility shall be reimbursed in accordance with the otherwise applicable rate-setting methodology as set forth in applicable statutes and this Subpart. The commissioner may establish, as a condition of receiving such a temporary rate adjustment, benchmarks and goals to be achieved in conformity with the facility's written proposal as approved by the commissioner and may also require that the facility submit such periodic reports concerning the achievement of such benchmarks and goals as the commissioner deems necessary. Failure to achieve satisfac-

tory progress, as determined by the commissioner, in accomplishing such benchmarks and goals shall be a basis for ending the facility's temporary rate adjustment prior to the end of the specified timeframe.

(ii) The commissioner may require that applications submitted pursuant to this section be submitted in response to and in accordance with a Request For Applications or a Request For Proposals issued by the commissioner.

(e) Federally qualified health centers with reimbursement rates issued pursuant to PHL § 2807(8) may apply for a temporary rate adjustment pursuant to this section as an alternative rate-setting methodology in accordance with the provisions of PHL § 2807(8)(f).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire May 12, 2012.

Text of rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The statutory authority for this regulation is contained in Section 2807(2-a)(e) of the Public Health Law (PHL) which authorizes the Commissioner to promulgate regulations, including emergency regulations, with regard to Medicaid reimbursement rates for outpatient services. Such outpatient rate regulations are set forth in Subpart 86-8 of Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulation of the State of New York.

Legislative Objectives:

Subpart 86-8 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York, will be amended to add this Section 8.15, which provides the commissioner authority to grant temporary rate adjustments to eligible Article 28 licensed ambulatory care providers subject to or affected by the closure, merger, acquisition consolidation, or restructuring of a health care provider in their service delivery area. In addition, the proposed regulation sets forth the conditions under which a provider will be considered eligible, the requirements for requesting a temporary rate adjustment, and the conditions that must be met in order to receive a temporary rate adjustment. The temporary rate adjustment shall be in effect for a specified period of time, as approved by the Commissioner, of up to three years. This regulation is necessary in order to maintain beneficiaries' access to services by providing needed relief to providers that meet the criteria.

Proposed section 86-8.15 requires providers seeking a temporary rate adjustment to submit a written proposal demonstrating that the additional resources provided by a temporary rate adjustment will achieve one or more of the following: (i) protect or enhance access to care; (ii) protect or enhance quality of care; (iii) improve the cost effectiveness of the delivery of health care services; or (iv) otherwise protect or enhance the health care delivery system, as determined by the Commissioner. The proposed amendment permits the Commissioner to establish benchmarks and goals, in conformity with a provider's written proposal as approved by the Commissioner, and to require the provider to submit periodic reports concerning its progress toward achievement of such. Failure to achieve satisfactory progress in accomplishing such benchmarks and goals, as determined by the Commissioner, shall be a basis for ending the provider's temporary rate adjustment prior to the end of the specified timeframe.

Needs and Benefits:

In the center of a changing health care delivery system, the closure, merger, acquisition, consolidation or restructuring of a health care provider within a community often happens without adequate planning of resources for the impact on health care providers in the service delivery area. In addition, maintaining access to needed services while also maintaining or improving quality becomes challenging for the impacted providers. The additional reimbursement provided by this adjustment will support the impacted Article 28 licensed ambulatory care providers in achieving these goals, thus improving quality while reducing health care costs.

Costs:

Costs to Private Regulated Parties:

There will be no additional costs to private regulated parties. The only additional data requested from providers would be periodic reports demonstrating progress against benchmarks and goals.

Costs to State Government:

There is no additional aggregate increase in Medicaid expenditures anticipated as a result of these regulations, as the cost of the temporary rate adjustment will be offset by the overall reduction in Medicaid expenditures due to the closure, merger, acquisition, consolidation or restructuring occurring in a particular service delivery area.

Costs to Local Government:

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of this proposed regulation.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of this proposed regulation.

Local Government Mandates:

The proposed regulation does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

An eligible provider must submit a written proposal, including a proposed budget. If a temporary rate adjustment is approved for a provider, the provider must submit periodic reports, as determined by the Commissioner, concerning the achievement of benchmarks and goals that are established by the Commissioner and are in conformity with the provider's approved written proposal.

Duplication:

This is an amendment to an existing State regulation and does not duplicate any existing federal, state or local regulations.

Alternatives:

No significant alternatives are available. Any potential ambulatory care provider project that would otherwise qualify for funding pursuant to the revised regulation would, in the absence of this amendment, either not proceed or would require the use of existing provider resources.

Federal Standards:

The proposed regulation does not exceed any minimum standards of the federal government for the same or similar subject area.

Compliance Schedule:

The proposed regulation provides the Commissioner of Health the authority to grant approval of temporary adjustments to rates calculated for Article 28 licensed ambulatory care providers that are subject to or affected by the closure, merger, acquisition, consolidation, or restructuring of a health care provider, for a specified period of time, as determined by the Commissioner, of up to three years.

Regulatory Flexibility Analysis

Effect of Rule:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be Article 28 licensed ambulatory care providers with 100 or fewer full-time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, 384 Article 28 licensed ambulatory care providers were identified as employing fewer than 100 employees.

No health care providers subject to this regulation will see a decrease in average per discharge Medicaid funding as a result of this regulation.

This rule will have no direct effect on local governments.

Compliance Requirements:

Article 28 licensed ambulatory care providers that receive the temporary rate adjustment under this regulation will be required to submit periodic reports demonstrating their progress toward benchmarks and goals established by the Commissioner.

The rule will have no direct effect on local governments.

Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are technologically feasible because it requires the use of existing technology. The overall economic impact to comply with the requirements of this regulation is expected to be minimal.

Minimizing Adverse Impact:

This regulation provides needed relief to eligible providers, thus a positive impact for small businesses that are eligible and no impact for the remainder. In addition, local districts' share of Medicaid costs is statutorily capped; therefore, there will be no adverse impact to local governments as a result of this proposal.

Small Business and Local Government Participation:

The State filed a Federal Public Notice, published in the State Register, prior to the effective date of the change. The Notice provided a summary of the action to be taken and instructions as to where the public, including small businesses and local governments, could locate copies of the corresponding proposed State Plan Amendment. The Notice further invited the public to review and comment on the related proposed State Plan Amendment. In addition, contact information for the Department of Health was provided for anyone interested in further information.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with populations less than 200,000

and, for counties with populations greater than 200,000, include towns with population densities of 150 persons or less per square mile. The following 43 counties have populations of less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene		

The following nine counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

For Article 28 licensed ambulatory care providers that receive the temporary rate adjustment, periodic reports must be submitted which demonstrate the achievement of benchmarks and goals set by the Commissioner.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

This regulation provides needed relief to eligible providers, thus a positive impact for small businesses that are eligible and no impact for the remainder. In addition, local districts' share of Medicaid costs is statutorily capped; therefore, there will be no adverse impact to local governments as a result of this proposal.

Rural Area Participation:

The proposal resulting in this regulation was endorsed by the Medicaid Redesign Team, which was established by the Governor. The Medicaid Redesign Team included members representing ambulatory care providers and rural areas and utilized a very public approach for soliciting both proposals and feedback from stakeholders and the public in general.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulation provides for a temporary rate adjustment to eligible Article 28 ambulatory care providers subject to or affected by the closure, merger, acquisition, consolidation, or restructuring of a health care provider in its service delivery area. The proposed regulation has no implications for job opportunities.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Adverse Event Reporting Via NYPORTS System

I.D. No. HLT-09-12-00001-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Amendment of sections 405.8 and 751.10 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2805-1

Subject: Adverse Event Reporting Via NYPORTS System.

Purpose: To update current provisions to conform with current practice.

Text of proposed rule: Pursuant to the authority vested in the Commissioner of Health by section 2805-1 of the Public Health Law, sections 405.8 and 751.10 of Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulations of the State of New York are hereby repealed and new sections 405.8 and 751.10 are hereby added; section 405.8 to be effective upon the publication of a Notice of Adoption in the New York State Register and section 751.10 to be effective 180 days after the publication of a Notice of Adoption in the New York State Register, to read, as follows:

Section 405.8 is repealed.

A new section 405.8 is added to read as follows:

405.8 Adverse Event Reporting

(a) Any adverse event required to be reported pursuant to subdivision (b) of this section shall be reported to the department. Hospitals shall report such adverse events, as defined in subdivision (b) of this section, within 24 hours or one business day of when the adverse event occurred or when the hospital has reasonable cause to believe that such an adverse event has occurred. This report to the department shall be submitted in a format specified by the department and shall at a minimum include: the date, the nature, classification and location of the adverse event; and medical record numbers of all patients directly affected by the adverse event.

(b) Adverse events to be reported are:

(1) patients' deaths in circumstances other than those related to the natural course of illness, disease or proper treatment in accordance with generally accepted medical standards;

(2) injuries and impairments of bodily functions, in circumstances other than those related to the natural course of illness, disease or proper treatment in accordance with generally accepted medical standards that necessitate additional or more complicated treatment regimens or that result in a significant change in patient status;

(3) equipment malfunction during treatment or diagnosis of a patient which results in death or serious injury of a patient;

(4) patient elopements resulting in death or serious injury;

(5) abduction of a patient of any age;

(6) sexual abuse/sexual assault on a patient or staff member within or on the grounds of a general hospital;

(7) physical assault of a patient or staff member within or on the grounds of a general hospital;

(8) discharge or release of a patient of any age, who is unable to make decisions, to other than an authorized person;

(9) patient or staff death or serious injury associated with a burn incurred from any source in the course of a patient care process;

(10) patient suicide, attempted suicide or self harm resulting in serious injury;

(11) poisoning occurring within the hospital;

(12) fires or other internal disasters in the hospital which disrupt the provision of patient care services or cause harm to patients or staff members;

(13) disasters or other emergency situations external to the hospital environment which affect hospital operations;

(14) termination of any services vital to the continued safe operation of the hospital or to the health and safety of its patients and staff members, including but not limited to the termination of telephone, electric, gas, fuel, water, heat, air conditioning, rodent or pest control, laundry services, food, or contract services; and

(15) strikes by staff members.

(c) The hospital shall conduct an investigation of adverse events described in paragraphs (1-10) of subdivision (b) of this section. Such investigations shall be thorough and credible and occur within thirty days of when the adverse event occurred or when the hospital has reasonable cause to believe that such an adverse event occurred or upon determination by the department that an investigation is warranted in order to protect patient health and safety. If the hospital reasonably expects such investigation to extend beyond the thirty day period, the hospital shall notify the department electronically of such expectation and the reason(s) and shall inform the department of the expected date of completion, not to exceed sixty days. For adverse events described in paragraphs (1- 10) of subdivision (b) of this section, the hospital shall submit its investigative report electronically, in a format prescribed by the department. The investigative report shall document all hospital efforts to identify and analyze the circumstances surrounding the adverse event and to develop and implement appropriate measures to prevent recurrence and improve the overall quality of patient care. This report shall be credible and thorough and contain all information in a format specified by the department.

(d) The requirements of this section shall be in addition to and shall not replace other reporting required by this Part.

(e) Nothing in this section shall prohibit the department from investigating any adverse event occurring in general hospitals.

Section 751.10 is repealed.

A new section 751.10 is added to read as follows:

751.10 Adverse Event Reporting

(a) Any adverse event required to be reported pursuant to subdivision (b) of this section shall be reported to the department within 24 hours or one business day of when the adverse event occurred or when the center has reasonable cause to believe that such an adverse event has occurred. This notification shall be submitted in a format specified by the department and shall at least include: the date, the nature, classification, and location of the adverse event and medical record numbers of all patients directly affected by the adverse event.

(b) Adverse events to be reported are:

(1) patients' deaths in circumstances other than those related to the natural course of illness, disease or proper treatment in accordance with generally accepted medical standards;

(2) injuries and impairments of bodily functions, in circumstances other than those related to the natural course of illness, disease or proper treatment in accordance with generally accepted medical standards that necessitate additional or more complicated treatment regimens or that result in a significant change in patient status;

(3) equipment malfunction during treatment or diagnosis of a patient which results in death or serious injury of a patient;

(4) patient elopements resulting in death or serious injury;

(5) abduction of a patient of any age;

(6) sexual abuse/sexual assault on a patient or staff member within or on the grounds of a center;

(7) physical assault of a patient or staff member within or on the grounds of a center;

(8) discharge or release of a patient of any age, who is unable to make decisions, to other than an authorized person;

(9) patient or staff death or serious injury associated with a burn incurred from any source in the course of a patient care process;

(10) patient suicide, attempted suicide or self harm resulting in serious injury;

(11) poisoning occurring within the center;

(12) fires or other internal disasters in the center which disrupt the provision of patient care services or cause harm to patients or staff members;

(13) disasters or other emergency situations external to the center environment which affect center operations;

(14) termination of any services vital to the continued safe operation of the center or to the health and safety of its patients and staff members, including but not limited to the termination of telephone, electric, gas, fuel, water, heat, air conditioning, rodent or pest control, laundry services, food, or contract services; and

(15) strikes by staff members.

(c) The center shall conduct an investigation of any adverse events described in paragraphs (1 - 10) of subdivision (b) of this section. Such investigation shall be thorough and credible and occur within thirty days of when the adverse event occurred or when the center has reasonable cause to believe that such an adverse event occurred or upon determination by the department that an investigation is warranted in order to protect patient health and safety. If the center reasonably expects such investigation to extend beyond the thirty day period, the center shall notify the department electronically of such expectation and the reason(s) and shall inform the department of the expected date of completion, not to exceed sixty days. This investigative report shall be thorough and credible and the center shall submit its report electronically, in a format prescribed by the department.

(d) Nothing in this section shall prohibit the department from investigating any adverse event included in subdivision (b) of this section occurring in such centers.

(e) The requirements of this section shall be in addition to and shall not replace other reporting required by this Chapter.

Text of proposed rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of this regulation is contained in Section 2805-1 of the Public Health Law (PHL). PHL Section 2805-1 outlines the adverse event reporting requirements for hospitals and diagnostic and treatment centers and directs the Commissioner to make,

adopt, promulgate and enforce such rules and regulations as he deems appropriate to effectuate the purposes of PHL Section 2805-l. PHL Section 2805-l also authorizes the Commissioner, after consultation with experts, to add, modify or eliminate by regulation one or more of the adverse events at PHL Section 2805-l consistent with the standards of a consensus based entity selected by the U.S. Department of Health and Human Services pursuant to the Medicare Improvement for Patients and Providers Act. That entity is currently the National Quality Forum (NQF).

Legislative Objectives:

The legislative intent of PHL Article 28 is to provide for the protection and promotion of the health of the inhabitants of the State of New York by delivering high quality hospital and related services in a safe and efficient manner at a reasonable cost. PHL Section 2805-l is intended to strengthen New York State's hospital and diagnostic and treatment center system by enhancing safeguards and protocols to ensure patient safety with its adverse event reporting requirements. Its aim is to ensure that facility staff become promptly aware of problems, take necessary corrective action and minimize the potential for recurrence. The Department has over time developed and implemented a state of the art and nationally recognized adverse event reporting system, the New York Patient Reporting System (NYPORTS), with a strong reliance on each facility's statutory reporting obligation.

Needs and Benefits:

Current adverse event reporting practice includes the reporting of defined occurrences, adverse events and unexpected deaths to the Department's Office of Health Systems Management's New York Patient Reporting System (NYPORTS). NYPORTS has been in place since 1998 and serves as a nationally recognized adverse event reporting system. NYPORTS is an internet-based system with all required security measures in place. Facilities can query the database to compare their experience with reported events statewide, regionally or within their peer group. While the identity of individual facilities in the comparative groups is not disclosed, the comparative database is a useful tool in support of facility quality improvement activities.

Chapter 542 of the Laws of 2000 created Article 29-D of the Public Health Law, known as the Patient Health Information and Quality Improvement Act of 2000. This law included provisions that established a patient safety center to maximize patient safety, reduce medical errors, and improve the quality of health care. This was to be accomplished by improving systems of data reporting, collection, analysis and dissemination, and to improve public access to health care information not otherwise restricted. The Department's NYPORTS activities support the mission of the patient safety center through its efforts to collect adverse event report data, analyses of the data and dissemination of such analyses to the hospital community.

A collaborative effort between the Department and stakeholders to align the NYPORTS system with national reporting trends resulted in statutory changes made by the Legislature in 2011. PHL Section 2805-l was revised to allow the Department to modify the reporting requirements so they align with the standards of a consensus based entity selected by the U.S. Department of Health and Human Services pursuant to the Medicare Improvement for Patients and Providers Act. That entity is currently the National Quality Forum (NQF). The amendments to PHL 2805-l also allow the Department to release, in a format that does not identify patients, analyses and findings derived from adverse event data to hospitals or the public and adverse event data to researchers for patient safety research projects approved by the Commissioner. These regulatory amendments: update the adverse reporting requirements to more closely align with NQF standards; update the process for reporting; and change the term "incident reporting" to conform with the terminology now used in PHL 2805-l which is "adverse event reporting".

Costs:

This proposal will not increase costs to the Department or to the facilities required to report adverse events to the Department via the NYPORTS system. These amendments update the regulations to: more closely align with NQF standards for reporting; update the process for reporting to reflect current practice; and conform terminology to statutory changes.

Local Government Mandates:

This regulation does not impose any new programs, services, duties, or responsibilities upon any county, city, town, village, school district, fire district or other special district including local government run general hospitals and diagnostic and treatment centers.

Paperwork:

There will be no additional paperwork as these amendments merely update the regulation to more closely align with NQF standards for reporting; update the process for reporting to reflect current practice; and conform terminology to statutory changes.

Duplication:

This regulation does not duplicate any other state or federal law or regulation.

Alternatives:

There are no other alternatives. The current regulation is out of date. This proposal updates the regulation to reflect current practice and to implement and conform with statutory changes.

Federal Standards:

This regulatory amendment does not exceed any minimum standards of the federal government.

Compliance Schedule:

The proposed rule will become effective upon publication of a Notice of Adoption in the State Register for Section 405.8 and 180 days after publication of a Notice of Adoption in the State Register for section 751.10.

Regulatory Flexibility Analysis

Pursuant to section 202-b of the State Administrative Procedure Act, a regulatory flexibility analysis is not required. This regulatory action simply updates already existing adverse event reporting requirements in sections 405.8 and 751.10 of 10 NYCRR to reflect current practice regarding the process for reporting and to implement and conform with statutory changes.

The proposed rule will not impose an adverse economic impact on any of the facilities required to report adverse events to the Department, and will not impose a negative impact on local governments. These provisions will not impose additional recordkeeping, reporting and other compliance requirements since the proposal simply updates already existing adverse event reporting and investigative requirements.

The proposed regulation is not subject to the requirement at State Administrative Procedure Act section 202-b(1-a) to provide for a cure period or other opportunity for ameliorative action because such provisions are required for only regulations that both require a regulatory flexibility analysis and involve violations or penalties associated with violations. This regulation does not require a regulatory flexibility analysis for the reasons noted above. Nor is this proposed regulation one that involves the establishment or modification of a violation or of penalties associated with violations. Rather, the regulation clarifies the process for adverse event reporting and provides the occurrences to report.

Rural Area Flexibility Analysis

Pursuant to section 202-bb of the State Administrative Procedure Act, a rural area flexibility analysis is not required. This regulatory action simply updates already existing adverse event reporting requirements in sections 405.8 and 751.10 of 10 NYCRR to reflect current practice regarding the reporting process and to implement and conform with statutory changes.

The proposed rule will not impose an adverse economic impact on hospitals and diagnostic treatment centers located in rural areas in New York State and will not impose any additional recordkeeping, reporting and other compliance requirements since the proposal simply updates already existing adverse event reporting and investigative requirements.

Job Impact Statement

A Job Impact Statement is not included because it is apparent from the nature and purpose of these amendments that they will not have a substantial adverse impact on jobs and employment opportunities. This proposal merely updates the adverse event reporting and investigative provisions in sections 405.8 and 751.10 of 10 NYCRR to reflect current practice regarding reporting process and to implement and conform to statutory changes.

Department of Motor Vehicles

NOTICE OF ADOPTION

Franklin County Motor Vehicle Use Tax

I.D. No. MTV-52-11-00006-A

Filing No. 135

Filing Date: 2012-02-14

Effective Date: 2012-02-29

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 29.12(ai) of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 1202(c)

Subject: Franklin County motor vehicle use tax.

Purpose: To impose a Franklin County motor vehicle use tax.

Text or summary was published in the December 28, 2011 issue of the Register, I.D. No. MTV-52-11-00006-P.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Ida L. Traschen, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 526, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Allocation of Renewable Portfolio Standard Funds; Overall RPS Funding, and Restructuring of the Photovoltaic Program

I.D. No. PSC-09-12-00010-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: The Commission is considering a petition by the New York State Energy Research and Development Authority proposing the implementation of a new solar photovoltaic initiative, NY Sun, and requesting funding within the Renewable Portfolio Standard.

Statutory authority: Public Service Law, sections 4(1), 5(2) and 66(1)

Subject: Allocation of Renewable Portfolio Standard funds; overall RPS funding, and restructuring of the photovoltaic program.

Purpose: To encourage electric energy generation for the State's consumers from renewable resources.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, potential modifications to the Renewable Portfolio Standard (RPS) program related to the "Petition for Expansion of RPS Customer-Sited Tier Photovoltaics Program" dated February 14, 2012 wherein the New York State Energy Research and Development Authority (NYSERDA) requests the expansion of the RPS Customer-Sited Tier (CST) to more efficiently and effectively maximize solar photovoltaic (PV) development in New York State. In its petition, NYSEDA requests implementation of a new Solar Photovoltaic (PV) initiative and authorization to use funds from the RPS program to further the objective of that initiative. The petition proposes funding mechanisms, including expansions of and/or revisions to existing RPS programs, and program designs to meet the goals of significantly increasing the installation of solar PV across New York.

NYSERDA is the designated administrator of the RPS program. The RPS program is funded by the collection from electric ratepayers of the authorized program costs according to schedules as to the amount and timing of collections authorized by the Commission. In its consideration of the petition described above, the Commission may consider whether adjustments to the amount and timing of collections are necessary or appropriate.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.ny.gov

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.ny.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-E-0188SP31)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Certain Rate Plan Provisions Which Should Continue or be Modified from the 2001 MJP in Case 01-M-0075

I.D. No. PSC-09-12-00011-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: The Commission is considering whether to approve, reject or modify, in whole or in part, the rate plan provisions in the Report on the Continuation of Certain Merger Joint Proposal (MJP) Provisions of Niagara Mohawk Power Corporation d/b/a National Grid.

Statutory authority: Public Service Law, section 66(12)

Subject: Certain rate plan provisions which should continue or be modified from the 2001 MJP in Case 01-M-0075.

Purpose: Consideration of certain rate plan provisions which should continue or be modified from the 2001 MJP in Case 01-M-0075.

Substance of proposed rule: The Commission is considering a whether to approve, reject, or modify, in whole or in part, the Rate Plan Provisions in the Collaborative Report on the continuation of certain Merger Joint Proposal provisions submitted by Niagara Mohawk Power Corporation d/b/a National Grid. The Rate Plan Provisions in the Collaborative Report address various key issues including: Corporate Structure, Affiliate Rules, Service Quality Reporting Requirements and Deferral Accounting guidance.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.ny.gov

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.ny.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(10-E-0050SP11)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Billing Provisions

I.D. No. PSC-09-12-00012-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: The Commission is considering a proposed tariff filing by Central Hudson Gas & Electric Corporation to make revisions to electric tariff schedule, P.S.C. No. 15—Electricity.

Statutory authority: Public Service Law, section 66(12)

Subject: Billing Provisions.

Purpose: To revise its billing provisions for customers that are both net metered and subject to hourly pricing provisions.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Central Hudson Gas & Electric Corporation to revise its billing provisions for customers that are both net metered and subject to hourly pricing provisions. The proposed filing has an effective date of June 1, 2012. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.ny.gov

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.ny.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(12-E-0043SP1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Issue Long-Term Debt, Common Stock and Stock Acquisition

I.D. No. PSC-09-12-00013-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: The Commission is considering the financing petition of Corning Natural Gas Corporation to issue debt and stock up to \$25,250,000 with up to \$3,550,000 to fund affiliates and to allow shareholders with more than 10 percent stock to purchase more.

Statutory authority: Public Service Law, sections 69 and 70

Subject: Issue long-term debt, common stock and stock acquisition.

Purpose: To authorize the issuance of debt and equity and authorize the acquisition of more than 10 percent of the voting capital stock.

Substance of proposed rule: The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, the petition of Corning Natural Gas Corporation (Corning) pursuant to Section 69 and Section 70 of the Public Service Law. Corning Natural Gas Corporation, Inc. proposes to issue long-term debt and stock in an aggregate amount of \$25,250,000 with up to \$3,550,000 of the proceeds to be used to fund affiliates and to allow shareholders who own more than 10 percent of Corning's stock the permission to acquire additional shares. The Commission shall consider all other related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann.ayer@dps.ny.gov

Data, views or arguments may be submitted to: Jaclyn A. Brillinger, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.ny.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(12-G-0049SP1)

Department of State

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED**

Local Government Performance and Efficiency Program

I.D. No. DOS-09-12-00002-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: This is a consensus rule making to add Part 816 to Title 19 NYCRR.

Statutory authority: Finance Law, section 54(10)(s); and Executive Law, section 91

Subject: Local Government Performance and Efficiency Program.

Purpose: To implement the requirements of Finance Law section 54(10)(s).

Text of proposed rule: A new Part 816 entitled Local Government Performance and Efficiency Program is added to Title 19 to read as follows:

Section 816.1 Purpose.

The purpose of this regulation is to implement the requirements of State Finance Law section 54(10)(s), which established the Local Government Performance and Efficiency Program beginning in the state fiscal year commencing April 1, 2011. The statute directed the Secretary of State to adopt rules and regulations for the program.

Section 816.2 Definitions.

As used in this Part, the following words and terms shall have the stated meaning:

(a) Municipality means a county, city, town, or village, but shall not include those counties contained within the City of New York.

(b) Secretary means the New York State Secretary of State.

Section 816.3 Eligibility.

All municipalities in New York State are eligible to apply individually or jointly, provided however that if an action was undertaken jointly, municipalities must apply jointly for an award for such an action. Awards shall only be made to municipalities for actions that have been fully implemented, that clearly resulted in quantifiable savings and efficiencies, and that produced permanent and quantifiable improvements in municipal efficiency and services.

Section 816.4 Awards.

(a) The secretary may make awards to applicants based on factors including, but not limited to, the amount of current and future savings produced by the applicant's action, the impact of such action upon the municipal property tax levy, the size and complexity of the action, and whether the action can be replicated by other municipalities.

(b) Subject to annual appropriations by the Legislature, awards will be made to successful applicants pursuant to eligibility criteria and application, review and approval procedures set forth herein. The maximum amount awarded per application shall not exceed the lesser of five million dollars or twenty-five dollars per resident of the applying municipality or municipalities as of the most recent federal decennial census, provided, however, that if the boundaries of municipalities jointly applying for an award pursuant to this program overlap, the residents in overlapping areas shall be counted only once, and provided, further, that if a county jointly applies with some but not all of the municipalities within such county, only the residents in such applying municipalities shall be counted. However, where municipalities within such county have benefited from the project upon which such joint application is based but are not applicants themselves, the population of such counties may, in the discretion of the secretary, be counted for the purposes of calculating the award amount.

(c) Prior to payments, recipients shall submit to the secretary copies of studies, agreements and other information on the action along with verification of cost savings.

(d) Applicants selected to receive awards will be required to meet deadlines for execution of contracts with the state in order to retain the award. If an applicant does not meet such established deadlines, that applicant's award funds may be returned to the funding pool for use by other eligible applicants. Applicants who lose eligibility as a result of missing deadlines may reapply for available funds if any remain after the initial disbursement of awards.

Section 816.5 Use of awards.

Awards received pursuant to the program shall be used by municipalities for general municipal purposes, provided however that if all or some portion of an award is to be used to finance the construction of a new or expanded public infrastructure project, such project will be reviewed for consistency with the relevant criteria specified in Article 6 of the Environmental Conservation Law, the State Smart Growth Public Infrastructure Policy Act.

Section 816.6 General application, review and approval procedures.

a) The secretary shall develop:

- 1) an application for municipalities seeking to receive awards; and
- 2) a process by which the applications will be evaluated.

b) Such application shall require municipalities to demonstrate how the action upon which the application is based has resulted in quantifiable recurring savings, efficiencies, and permanent improvements to municipal services.

c) Applications shall be considered only for actions that commenced on or after January 1, 2010.

d) Actions on the basis of which municipalities apply must already have been implemented at the time of application.

Section 816.7 Contents of application.

a) Application for awards shall be made using forms prescribed by the secretary.

b) Applications shall contain, but not be limited to containing, the following:

- 1) a detailed description of the action, including:
 - i) the date the action commenced, and
 - ii) the date the action was fully implemented;

- 2) the designation of a contact person or award administrator;
 3) the names and contact information for representatives of each municipality applying for recognition of the action;
 4) a resolution of each municipality's governing body requesting recognition of the action;
 5) any inter-municipal agreements entered into to carry out the action;
 6) a description of any funds previously awarded by the Department of State to finance the action.

Section 816.8 Miscellaneous.

(a) The Department of State will provide outreach services to inform municipalities of the availability of funding and provide information to applicants concerning application preparation and submission.

(b) The secretary may focus the program in specific functional service areas, in which case such areas of focus shall be detailed in a request for applications.

(c) All action recognition must be undertaken pursuant to a contract with the Department of State, which contract shall require, in addition to the requirements of the Department of State, Attorney General and State Comptroller, that all contracts not to be performed by the officials and employees of the awardee be entered into in accordance with General Municipal Law, sections 103 and 104-b. Awards may be made in amounts less than those requested by applicants in order to allow the department to recognize a greater number of projects.

Text of proposed rule and any required statements and analyses may be obtained from: Kyle Wilber, NYS Department of State, Division of Local Government Services, 99 Washington Avenue, Albany, NY 12231, (518) 473-3355, email: Kyle.Wilber@dos.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Consensus Rule Making Determination

New York State Finance Law, section 54(10)(s) established the Local Government Performance and Efficiency Program beginning in the state fiscal year commencing April 1, 2011. Part 816 is being proposed as an addition to Title 19 of NYCRR to comply with State Finance Law, section 54(10)(s)(vii), which directed the Secretary of State to adopt rules and regulations for the program. The Department has considered the proposed addition of Part 816 and has determined that this rule making is a consensus rule making within the meaning of section 102(11) of the State Administrative Procedure Act; no person is likely to object to the adoption of the rule as written because it merely sets forth requirements found in statutory provisions.

Job Impact Statement

A Job Impact Statement is not required for this proposed addition of Part 816 to Title 19 NYCRR, regarding the Local Government Performance and Efficiency Program - a voluntary program whereby municipalities may apply for awards only to recognize actions that municipalities have already implemented. This rule is being proposed in order to comply with State Finance Law, section 54(10)(s), which established the LGPEP and directed the Secretary of State to adopt rules and regulations for the program. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs or employment opportunities. Further, it is evident from the subject matter of the rule that it will not impact jobs and employment opportunities.

Office of Temporary and Disability Assistance

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Fair Hearings Process

I.D. No. TDA-17-11-00016-RP

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following revised rule:

Proposed Action: Amendment of section 358-5.5 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 22(8) and 34(3)(f)

Subject: Fair Hearings Process.

Purpose: Amend fair hearings regulations to revise the time frames within which an Appellant or an Appellant's representative must request that a defaulted fair hearing be rescheduled.

Text of revised rule: Section 358-5.5 of Title 18 NYCRR is amended to read as follows:

§ 358-5.5 Abandonment of a request for a fair hearing.

(a) OAH will consider a fair hearing request abandoned if neither the appellant nor the appellant's [authorized representative] attorney (or an employee of the attorney) appears at the fair hearing unless either the appellant or the appellant's [authorized] representative has:

(1) contacted OAH [within 15 days of the scheduled date of the fair hearing] to request that the fair hearing be rescheduled; and

(2) provided OAH with a good cause reason for failing to appear at the fair hearing on the scheduled date[; or

(3) contacted OAH within 45 days of the scheduled date of the hearing and establishes that the appellant did not receive the notice of fair hearing prior to the scheduled hearing date].

(b) OAH will restore a [case] fair hearing to the calendar if the appellant or the appellant's [authorized] representative has met the requirements of subdivision (a) of this section.

(c) If the appellant defaults a fair hearing that is subject to aid-continuing, the right to aid-continuing ends upon default.

(1) If the fair hearing is restored to the calendar based upon a request to do so made within 60 days from the date of the default, aid-continuing will be restored retroactively.

(2) If the fair hearing is restored to the calendar based upon a request to do so made 60 days or more from the date of the default, aid-continuing will be restored prospectively only from the date of the request to restore the fair hearing to the calendar.

(d) In no event will a defaulted fair hearing be restored to the calendar if the request to do so is made one year or more from the date of the defaulted fair hearing.

Revised rule compared with proposed rule: Substantial revisions were made in section 358-5.5.

Text of revised proposed rule and any required statements and analyses may be obtained from Jeanine S. Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, Floor 16C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@otda.ny.gov

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 30 days after publication of this notice.

Revised Regulatory Impact Statement

1. Statutory authority:

Social Services Law (SSL) § 20(3)(d) authorizes the Office of Temporary and Disability Assistance (OTDA) to promulgate regulations to carry out its powers and duties.

SSL § 22(8) requires OTDA to promulgate regulations as may be necessary to administer its fair hearings process.

SSL § 34(3)(f) requires the Commissioner of OTDA to establish regulations for the administration of public assistance and care within the State.

2. Legislative objectives:

It was the intent of the Legislature in enacting the above statutes that OTDA establish rules in order to assure that the due process rights of applicants for and recipients of public assistance, medical assistance, food stamps and services are adequately protected. Furthermore, these statutes give OTDA the authority to promulgate regulations concerning the administration of the fair hearings process.

3. Needs and benefits:

The regulations governing the fair hearings process for public assistance, medical assistance, food stamps and services are generally contained in 18 NYCRR Part 358. This instant regulatory change is in response to a case titled, Donald Johnson v. Elizabeth R. Berlin, et ano, Sup. Ct. New York County (400081/10). While the current regulations protect the rights of individuals who ask for hearings (the "Appellants"), the goal of this change is to ensure that the due process rights of Appellants are protected in instances where they have good cause reasons for not attending their scheduled fair hearings.

OTDA received comments on the regulations and in response thereto made changes to the regulations as originally proposed. The substantive change to 18 NYCRR § 358-5.5 would remove the 15-day and 45-day time frames within which an Appellant or Appellant's authorized representative is to request that a fair hearing be rescheduled. The criteria for reviewing an Appellant's reason for missing the scheduled hearing would be whether the Appellant has established good cause for missing same. What constitutes a good cause would be determined on a case-by-case basis and would be relative to the circumstances of each Appellant. This

means that the Appellant's time frame to contact OTDA's Office of Administrative Hearings (OAH) would be proscribed by the Appellant's good cause reason, and timeliness would be a factor to be considered in such determination. Additionally, mindful of the comments received, yet weighing the due process rights of fair hearing Appellants, the proposed regulations were changed to provide a one year time frame from the date of the default within which to ask for the hearing to be reopened. Furthermore, if the request to reopen is made 60 days or more from the date of the default, aid-continuing will be restored prospectively only from the date of the request.

The regulation is also being amended to reflect current policy and practice regarding who may appear at a hearing and who may request that a defaulted hearing be reopened. The proposal would reflect actual policy and practice by clarifying that the Appellant, the Appellant's attorney, or an employee of the Appellant's attorney must appear at the scheduled hearing. Also the proposal broadens the range of persons who may contact OAH on behalf of an Appellant to request that a defaulted hearing be reopened and to establish good cause. The proposal would clarify that the Appellant or a representative of the Appellant, as opposed to an "authorized representative," may contact OAH to try to reopen a defaulted fair hearing. This update reflects that a family member, a friend or another person acting on the Appellant's behalf may contact OAH under these circumstances. Lastly, the proposal provides consistency and again clarifies that the Appellant or the Appellant's representative can satisfy the requirements of 18 NYCRR § 358-5.5(a) to contact OAH after a defaulted hearing and to request that the Appellant's fair hearing be restored to the calendar.

4. Costs:

These regulatory amendments would have no significant cost impact, and the specific time frames will balance the amount of aid-continuing to be paid and give repose to claims, while providing for the ongoing needs of an Appellant.

5. Local government mandates:

The proposed amendments may have a nominal impact on social services districts. Both before and after the regulatory change, the social services districts would be required to send a representative to attend the underlying hearing and be prepared to defend the case on the merits. After the regulatory change, there is a greater likelihood that the matter would proceed to the merits rather than be dismissed on procedural grounds. As such, there is an increased likelihood of action necessary by the social services districts to comply with resulting client-favorable fair hearing decisions that prior to the regulation change might have resulted in procedural dismissals of the hearing requests.

These regulatory amendments would not impose any additional programs, services, duties or responsibilities upon the social services districts, other than the above. OAH is responsible for reviewing requests to have fair hearings rescheduled and for making good cause determinations.

6. Paperwork:

There would be no additional forms required to support this process.

7. Duplication:

The proposed amendments to 18 NYCRR § 358-5.5 would not duplicate, overlap or conflict with any existing State or federal requirements.

8. Alternatives:

The alternative is to leave the regulation as it is currently written. However, OTDA is pursuing amendments because the goal of this rule is to ensure fairness in the hearings process.

9. Federal standards:

The proposed amendments would not conflict with federal standards for public assistance, medical assistance, food stamps and services.

10. Compliance schedule:

Social services districts would be in compliance with the proposed amendments upon their adoption, and OAH would utilize its existing administrative framework to be in compliance with the proposal on its effective date.

Revised Regulatory Flexibility Analysis

1. Effect of rule:

The proposed amendments would have no effect on small businesses. The proposed amendments may have a nominal impact on social services districts. Both before and after the regulatory change, the social services districts would be required to send a representative to attend the underlying hearing and be prepared to defend the case on the merits. After the regulatory change, there is a greater likelihood that the matter would proceed to the merits rather than be dismissed on procedural grounds. As such, there is an increased likelihood of action necessary by the social services districts to comply with resulting client-favorable fair hearing decisions that prior to the regulatory change might have resulted in procedural dismissals of the hearing requests.

2. Compliance requirements:

As this proposed regulation is primarily directed at OTDA's administra-

tion of the hearings process, these regulatory amendments would only have a nominal impact on the social services districts.

3. Professional services:

The proposed amendments would not require small businesses or local governments to hire additional professional services.

4. Compliance costs:

These regulatory amendments would have no significant cost impact.

5. Economic and technological feasibility:

All small businesses and local governments have the economic and technological ability to comply with the proposed regulation.

6. Minimizing adverse economic impact:

It is anticipated that there would not be an adverse economic impact.

7. Small business and local government participation:

All 58 social services districts in the State have had opportunities to review and comment upon these proposed regulatory amendments. The first round of comments was responded to in the April 27, 2011 issue of the New York State Register (I.D. No. TDA-17-11-00016-P). More comments were received in response to the April 27, 2011 publication. These later comments are addressed in the Assessment of Public Comments.

Revised Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The proposed amendments may have a nominal impact on the forty-four rural social services districts in the State. Both before and after the regulatory change, the rural social services districts would be required to send a representative to attend the underlying hearing and be prepared to defend the case on the merits. After the regulatory change, there is a greater likelihood that the matter would proceed to the merits rather than be dismissed on procedural grounds. As such, there is an increased likelihood of action necessary by the rural social services districts to comply with resulting client-favorable fair hearing decisions that prior to the regulatory change might have resulted in procedural dismissals of the hearing requests.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

No additional record keeping, reporting or compliance would be required by the rural social services districts, other than that noted above. The proposed amendments would primarily affect the operations of OTDA's Office of Administrative Hearings.

3. Costs:

These regulatory amendments would have no significant cost impact.

4. Minimizing adverse impact:

It is anticipated that there would not be an adverse economic impact.

5. Rural area participation:

All rural social services districts in the State have had opportunities to review and comment upon these proposed regulatory amendments. The first round of comments was responded to in the April 27, 2011 issue of the New York State Register (I.D. No. TDA-17-11-00016-P). More comments were received in response to the April 27, 2011 publication. These later comments are addressed in the Assessment of Public Comments.

Revised Job Impact Statement

A Job Impact Statement is not required for the proposed amendments. It is apparent from the nature and the purpose of the proposed amendments that they would not have a substantial adverse impact on jobs and employment opportunities in the private or public sectors. The proposed amendments would not affect in any real way the jobs of the workers in the social services districts. Thus the changes would not have any adverse impact on jobs and employment opportunities in the State.

Assessment of Public Comment

The Office of Temporary and Disability Assistance (OTDA) received 14 communications regarding the regulation change. Three of the communications were requests for information. Ten of the communications were comments from eight different social services districts, including New York City, suburban counties and rural counties. One of the comments was for clarification. One comment was received from the advocate community. All of these comments were reviewed and considered in the revised regulatory proposal and this assessment.

In regard to the comment from the advocate community, the commentator identified himself as class counsel in a case called *Fishman v. Daines*, 09-CV-5248 (EDNY) and signed his comments as being class counsel in a case called *Cavetti v. Berlin*, 4598/11 (Sup Ct., Nassau Co). The gravamen of the *Fishman* case involves whether a section of the State Medicaid manual constitutionally mandates the sending of a post-default letter. The *Fishman* case is distinct from *Donald Johnson v. Berlin*, et ano, 400081/10 (Sup. Ct., New York Co.), which precipitated the review of the instant regulation. While the cases are distinct, the proposed change in the regulation will greatly ameliorate the situations in both the *Fishman* and *Johnson* cases, in which Appellants defaulted scheduled fair hearings, by giving them a balanced opportunity to be heard and to return to the fair hearing process, while taking into account the needs of the social services districts.

To the extent that the comment received presented legal arguments from the Fishman case, those arguments will not be addressed in this response. OTDA's Assessment of Public Comment is strictly limited to those comments submitted with respect to the proposed rule itself and the manner of its promulgation.

The social services districts' comments raised the following issues: concerns that aid-continuing would be "perpetual" or unlimited; concerns that there would be abuse of the new rule by fair hearing Appellants; fear that there would be a lack of finality to the fair hearings process; and requests that a time limit be established.

At the outset, it should be noted that Appellants will have the initial burden of demonstrating that they have a good cause reason for missing the originally scheduled hearing. One comment did not object to the regulatory change, but requested clarification concerning who would make the initial decision that aid-continuing be directed. OTDA contemplates that the initial determination will be made by the intake staff at the Office of Administrative Hearings and then be reviewed by an Administrative Law Judge, as it is done now. As such, aid-continuing is not automatic. Timeliness would be a factor in the good cause determination.

Mindful of the concerns of the social services districts, yet weighing the due process rights of those fair hearing Appellants who may be entitled to their benefits after having a legitimate reason for defaulting, the proposed regulations were changed to provide a one year time frame from the date of the default within which to ask for the hearing to be reopened. Additionally, if the request to restore the hearing to the calendar is made 60 or more days from the date of the default, aid-continuing will be restored prospectively only from the date of the request. This will balance the amount of aid-continuing to be paid, while providing for the ongoing needs of an Appellant. As such, these items in tandem get at the root of the social services districts' concerns, yet protect the due process rights of the Appellants in a reasonable manner as compared to the regulation in its current form.

Other comments by the social services districts

The comments indicated that there was some confusion as to the definitions of good cause and timeliness. At least one comment seemed to assert that there was no existing good cause standard in the current regulations. However, the current 15 day time frame is subject to a good cause standard and the meaning of good cause will remain as it is commonly understood. Also the revised proposal clearly addresses the issues of timeliness by establishing 60 day and one year time frames.

Other social services districts believed that the regulation should be focused only on disabled persons. However, the current regulation and the proposed regulation take into account situations where disabled persons and able-bodied persons may have bona fide reasons for missing the hearing date and thus provides uniformity in application.

One of the social services districts urged that the regulations not be changed because they were currently adequate as OTDA's Administrative Law Judges have the authority to override the 15 and 45 day time frames. In fact, the current regulations do not provide this authority.

Another social services district had a question regarding the maintenance of Appellants' case files. As before, the social services districts should continue their current case retention policy. The concern that case files would have to be kept for an unlimited time period is ameliorated by the one year time frame inserted in the revised proposal.

It should be noted that the regulations are being conformed to clarify who may appear at a hearing and who may request that the case be reopened. These amendments are consistent with current policy and practice.

Statutory authority: Transportation Law, section 156(2)

Finding of necessity for emergency rule: Preservation of public safety.

Specific reasons underlying the finding of necessity: This emergency rule is being promulgated on February 13, 2012 to provide standards for the suspension or revocation of operating authority of motor carriers of passengers by motor vehicles (carriers). This rule will become effective on the same date.

Bus companies may operate within the state of New York only upon operating authority in permits and certificates issued by the United States Department of Transportation or issued by the Commissioner of Transportation pursuant to Article 7 of the Transportation Law. Passenger carriers must comply with safety regulations found at 17 NYCRR Part 720. A recent series of tragic accidents that resulted in deaths and personal injuries involving carriers has revealed that it is possible for a carrier to have multiple safety violations, or even have federal operating authority suspended or revoked, and yet continue to operate under authority issued by the Commissioner of Transportation within the state of New York.

The emergency rule provides that the state operating authority may be suspended in the event that a carrier has had a suspension or revocation of concurrent federal operating authority or because of safety violations that would suggest that the continued operation of such carrier poses a threat to public safety. In addition to requiring continued federal operating authority (where applicable), the new rule provides the basis for the suspension or revocation of state operating authority and prescribes procedures whereby such suspension and/or revocation of state operating authority and prescribes procedures whereby such suspension and/or revocation will be effected.

Subject: Suspension and revocation of operating authority held by motor carriers of passengers.

Purpose: The protection of public safety by suspending operating authority of unsafe motor carriers.

Text of emergency rule: § 720.32 Suspension and revocation of operating authority.

(a) Notwithstanding any regulation of the department to the contrary, pursuant to section 156, subdivision 2 of the Transportation Law, the Commissioner may immediately suspend or revoke the authority for operation authorized by certificate or permit for any of the following safety violations:

(1) Out of service violations which are determined by the Commissioner to be conditions or activities which constitute a danger to the safety of the people and which are found to have occurred for such carrier in the preceding six-month period. The incidence of out of service violations triggering a suspension or revocation of authority shall be as follows:

(i) For a carrier with at least one, but no more than five buses at any time in the preceding six month period: three violations.

(ii) For a carrier with at least six, but no more than twenty buses at any time in the preceding six month period: four violations.

(iii) For a carrier with more than twenty-one buses at any time in the preceding six month period: five violations.

(iv) For a carrier with at least ten department semi-annual inspections performed between April 1, 2010 and March 31, 2011 that resulted in an out-of service rate greater than 25%.

(2) Driving a bus while intoxicated in violation of the vehicle and traffic law;

(3) Driving a bus while using or in possession of drugs in violation of the vehicle and traffic law;

(4) Driving a bus after such driver has been placed out of service in violation of the transportation law, vehicle and traffic law or regulations adopted thereunder;

(5) Driving a bus that has been placed out of service in violation of the transportation law, vehicle and traffic law or regulations adopted thereunder; or

(6) Driving a bus without a required license in violation of the vehicle and traffic law.

(b) Notwithstanding any regulation of the department to the contrary, the Commissioner may immediately suspend or revoke the authority of any carrier operating pursuant to a certificate or permit

Department of Transportation

EMERGENCY RULE MAKING

Suspension and Revocation of Operating Authority Held by Motor Carriers of Passengers

I.D. No. TRN-09-12-00003-E

Filing No. 130

Filing Date: 2012-02-13

Effective Date: 2012-02-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of section 720.32 to Title 17 NYCRR.

issued by the Commissioner pursuant to Article 6 or Article 7 of the Transportation Law if such carrier operates concurrently under any authority issued by the United States Department of Transportation, Federal Motor Carrier Safety Administration, and such federal operating authority has been suspended or revoked.

(c) The suspension of operating authority as provided in sub-sections (a) or (b) shall be effective five business days after the date of issuance. Pending the effective date of such suspension, any carrier subject to this section may be heard to present proof as to why such suspension should not occur or should not have occurred. The Commissioner shall make a determination based upon a hearing of the proof whether such suspension shall become effective or continue and a hearing regarding permanent revocation shall be scheduled. In addition to or in lieu of any suspension or revocation, the Commissioner may, after a hearing, impose a civil penalty upon such carrier in accordance with the provisions of Article 6 of the Transportation Law.

(d) Whenever because of danger to public safety or the welfare of the people it appears prejudicial to the interests of the people of the state, the commissioner may serve the respondent with a notice or order requiring certain action or the cessation of certain activities immediately or within a specified period, and the commissioner shall provide an opportunity to be heard within a period specified in such notice or order.

(e) Service may be made personally or by certified mail, return receipt requested, and a hearing shall be conducted pursuant to the provisions of section 503.2 of this title, except for the notice provisions, provided however, that notice may be made pursuant to sub-section (d) or this sub-section.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire May 12, 2012.

Text of rule and any required statements and analyses may be obtained from: David E. Winans, Associate Counsel, New York State Department of Transportation, Div. of Legal Affairs, 50 Wolf Rd., Albany, NY 12232, (518) 457-5793, email: dwinans@dot.ny.gov

Regulatory Impact Statement

1. Statutory authority:

Transportation Law section 138(2), Transportation Law Section 140, Transportation Law Section 145(1).

The commissioner of transportation is empowered to prescribe rules and regulations concerning the issuance of certificates and permits to motor carriers.

2. Legislative objectives:

To promote public safety by assuring that motor carriers engaging in intrastate transportation as common carriers of passengers by motor vehicle comply with the laws and regulations relating to vehicle and driver safety as required by transportation Law Section 140 as a condition of continued use of the permit or certificate required by Transportation Law Section 152.

3. Needs and benefits:

The emergency rule provides a mechanism for the suspension and revocation of intrastate operating authority for motor carriers of passengers with poor safety records. Bus companies may operate within the state of New York only upon operating authority issued by the United States Department of Transportation (for interstate transportation) or issued by the commissioner of transportation (for intrastate transportation). Operating authority from the commissioner of transportation is conditioned upon compliance with safety laws and regulations, including the regulations of the Federal Motor Carrier Safety Administration that are incorporated into the commissioner's safety regulations by 17 NYCRR Section 720(a).

A series of recent accidents involving bus companies has exposed the potential for a bus company to have multiple safety violations, or even have federal operating authority suspended or revoked, and yet continue to operate under authority issued by the commissioner of transportation within the state of New York. The commissioner has concluded that the continued operation of any such bus company that fails to meet the applicable laws and regulations relating to vehicle safety and/or driver credentialing and/or hours-of-service requirements poses a threat to public safety.

The commissioner has determined that the continued access to state operating authority is contrary to the interests of public safety (1) where a motor carrier has a high incidence of being taken out-of-service as the result of roadside inspections, (2) where a motor carrier has a high rate of out-of-service violations found during the course of semi-annual vehicle inspections, (3) where a roadside inspection or other investigation reveals certain egregious violations of law, or (4) where a motor carrier's federal operating authority has been suspended or revoked.

The purpose of the emergency rule is to provide criterion and a framework for the suspension of state operating authority in the event that a bus company fails to meet objective requirements relating to safety. In the addition to requiring continued federal operating authority (where applicable), the rule articulates the basis for action and provides a framework for the suspension and revocation of operating authority.

4. Costs:

Regulated parties have an obligation under the existing laws and regulations to conform to safety requirements. The new rule imposes no additional safety requirements. There are no added costs associated with compliance. Noncompliance with laws and regulations related to safety presently carry costs in the form of civil penalties that may be imposed. The new rule expands the number of situations where civil penalties may be imposed under Transportation Law Section 145.

5. Local government mandates:

The rule imposes no government mandates.

6. Paperwork:

The rule includes no reporting requirements.

7. Duplication:

There are no rules that relate to the suspension or revocation of intrastate operating authority.

8. Alternatives:

Transportation Law Section 145 provides that the commissioner of transportation may suspend or revoke any permit or certificate after a hearing. However, there is no law or regulation prescribing the reasons that such action may be taken in the form of any objective criterion. It has been concluded that the adoption of a rule setting forth objective criterion that warrants suspension and revocation affords motor carriers with appropriate warning that action will be taken and affords equal application of criterion and due process to motor carriers.

9. Federal standards:

There are no federal standards relating to state operating authority.

10. Compliance schedule:

Compliance with existing laws and regulations has been and remains a requirement for all motor carriers. Compliance with the applicable laws and regulations obviates the necessity of any action under the new rule.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule applies exclusively to motor carriers of passengers by motor vehicles that possess a permit or certificate from the commissioner of transportation pursuant to articles 6 or 7 of the Transportation Law. There are approximately 2,600 such motor carriers that possess such operating authority. These motor carriers are primarily limousine and charter bus operators engaged in at least some intrastate transportation of passengers for hire.

2. Compliance requirements:

The requirements applicable to motor carriers are set forth in existing laws and regulations. The new rule imposes no additional record-keeping or reporting requirements. The new rule provides only the criterion warranting the sanction of suspension or revocation of operating authority for a motor carrier's non-compliance with rules and a framework for the application of such sanctions.

3. Professional services:

Motor carriers are already required to comply with safety requirements. The new rule will mean action against non-compliant motor carriers. Motor carriers that trigger action under the new rule

may seek professional services in an effort to retain operating authority.

4. Compliance costs:

No additional compliance costs are anticipated.

5. Economic and technological feasibility:

No additional requirements are imposed by the new rule. The rule simply sets forth the objective criterion of action to suspend or revoke operating authority and provides the framework by which action will be taken that affords motor carriers with due process.

6. Minimizing adverse impact:

The new rule is designed to help small business by establishing the objective criteria that will trigger action by the commissioner. The actions that would be taken by the commissioner under the new rule are based upon existing laws and regulations.

7. Small business and local government participation:

The laws and rules that are applicable to motor carriers are not changed by the rule. Non-compliance with the laws and regulations will trigger action to suspend or revoke operating authority. Small businesses seeking to avoid action to suspend or revoke their operating authority must comply with the existing laws and regulations.

8. For rules that either establish or modify a violation or penalties associated with a violation:

There is the potential for the imposition of penalties on small business, but not localities. The agency has considered affording an opportunity to cure provision, but because the basis for action under the emergency rule is a threat to public safety, and because the importance of protecting public safety can only be reinforced by real consequences, the imposition of penalties, including suspension or revocation, is deemed to be the most appropriate action.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The rule applies across the state.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The rule includes no reporting requirements. Motor carriers are already required to comply with safety requirements. The new rule will mean action against non-compliant motor carriers. Motor carriers that trigger action under the new rule may seek professional services in an effort to retain operating authority.

3. Costs:

There are no new regulatory requirements that would entail additional costs for compliance.

4. Minimizing adverse impact:

The rule has no impact upon motor carriers that comply with existing laws and regulations.

5. Rural area participation:

The laws and rules that are applicable to motor carriers are not changed by the rule. Non-compliance with the laws and regulations will trigger action to suspend or revoke operating authority. Small businesses seeking to avoid action to suspend or revoke their operating authority must comply with the existing laws and regulations.

Job Impact Statement

1. Nature of impact:

The rule will have no impact on jobs or employment opportunities in relation to motor carriers who comply with existing laws and regulations relating to motor carrier safety. It is possible that non-compliant motor carriers who are in violation of safety laws and regulations may experience a suspension or revocation of state operating authority as a result of their failure under the new rule and that this could result in a loss of employment opportunities for persons employed by or seeking employment with non-compliant motor carriers. It is equally possible that, being compelled to comply with the existing laws and regulations, motor carriers may be compelled to create new job opportunities for mechanics, drivers and compliance specialists.

2. Categories and numbers affected:

Motor carriers with state operating authority employ bus operators,

clerical staff, and various maintenance employees including cleaners and mechanics. The number of employees required by a motor carrier is that number that is necessary to comply with the existing laws and regulations.

3. Regions of adverse impact:

No adverse impact on jobs in any region is anticipated. The impact on employment stems, not from the new rule, but from the existing laws and regulations.

4. Minimizing adverse impact:

The purpose of the rule is to compel compliance with existing laws and regulations that are designed to preserve public safety. The absence of such a mechanism for removing operating authority from unsafe motor carrier jeopardizes public safety. Compliant motor carriers will experience no impact on jobs or employment.